(24,534)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 790.

THE TEXAS & PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MISS MAY MARCUS.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the First Monday in November, A. D. 1914, at Fort Worth, Texas, before the Honorable Don A. Pardee and the Honorable Richard W. Walker, Circuit Judges, and the Honorable Rhydon M. Call, District Judge.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
versus
Miss MAY MARCUS, Defendant in Error.

Be it remembered, that heretofore, to-wit on the 17th day of April, A. D. 1914, a transcript of the record of the above styled cause, pursuant to a writ of error to the District Court of the United States for the Eastern District of Texas, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2637, as follows:

CAPTION

Be it remembered that at a term of the United States District Court in and for the Eastern District of Texas, holding sessions at Jefferson, Texas, at its October Term, A. D. 1913, and on the ninth day of October, 1913, in cause No. 592, wherein May Marcus was plaintiff, and the Texas & Pacific Railway Company was defendant, a judgment was rendered in favor of May Marcus the plaintiff, and against the Texas & Pacific Railway Company, for the sum of Six Thousand ($6,000.00) Dollars.

The following proceedings were had, to-wit:

TRANSCRIPT OF RECORD

United States
Circuit Court of Appeals
FIFTH CIRCUIT

PETITION

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, AT JEFFERSON.

MISS MAY MARCUS

vs.

TEXAS & PACIFIC RAILWAY COMPANY.

To the Honorable J. Gordon Russell, Judge of said Court:

Now comes May Marcus, plaintiff herein, leave of Court being first had and obtained, and files this her amended original petition, amending her original petition heretofore

filed herein so that the same shall hereafter read as follows, to-wit:

Your petitioner, May Marcus, who will be styled plaintiff herein, complaining of the Texas & Pacific Railway Company, which will be styled defendant herein, represents and shows that the plaintiff resides in Marshall, Harrison County, Texas, and that the defendant is a body politic duly incorporated, and has and had at he time herein set out, in operation in and through Harrison County, Texas, certain lines of railroad over which it conducted and is conducting the business of common carrier of passengers and freight and that it has a local agent in Marshall, Harrison County, Texas, upon whom process may be served.

The plaintiff shows that heretofore, to-wit: On or about the 15th day of October, 1911, the said May Marcus, was at the depot or station of the defendant Texas & Pacific Railway Company, in Marshall, Harrison County, Texas, where she had gone to accompany and assist a relative to the train of the defendant, that left Marshall, Texas, in the early part of the night for Shreveport, and New Orleans, Louisiana, and that while returning from the said train that the said plaintiff received serious and permanent injuries by reason of the negligence of the said defendant Railway Company as will hereinafter be more fully set out.

The plaintiff shows that there arrived at the station in Marshall, Texas, on the tracks of the defendant Railway Company a passenger train from the west, generally known as No. 2 and being a northbound train, which had as its destination Texarkana, a station north of Marshall, and that the said Railway Company causes the said train to be placed upon one of its tracks at the said depot or station and between the depot and station and the said Shreveport and New Orleans train and caused the vestibule doors between the cars of the said train from the west to be thrown open for the purpose of permitting passengers and licensees and the public to pass to and from the depot and the Shreveport train and which was done for the purpose of permitting

persons that wished to pass from the depot to the Shreveport train or from the Shreveport train to the depot or to other places, to cross between the cars at said openings. That the said Railway Company knew that passengers proposing to leave Marshall, on the said Shreveport or New Orleans train habitually crossed over the northbound or Texarkana train in going to the said Shreveport or New Orleans train and knew that friends and relatives, and the public passed over the said Texarkana or northbound train through said doors after assisting or speeding their relatives, guests and friends upon the Shreveport train and in going from the Shreveport train to the depot and from the depot to the Shreveport train, and the said defendant Railway Company acquiesced in and encouraged the said use of the said vestibule openings between the coaches of the said northbound or Texarkana train for such purposes.

The said plaintiff shows that on the date that the plaintiff was injured that the said plaintiff had assisted a relative upon the said Shreveport train and was returning from the Shreveport train to the depot or station, or was going to her home in said city, and that after she had gotten upon the said Texarkana train in an attempt and effort to pass over the same, at one of the said vestibule openings between the said coaches, that the said defendant Railway Company caused the said train to be suddenly moved to the west at a high and rapid rate of speed and that just as the said plaintiff, May Marcus, was leaving the said steps of one of the said coaches that the said train was given a sudden jerk, lurch or bump that threw and caused the said plaintiff to fall from the said steps which inflicted upon her the injuries herein mentioned.

The plaintiff shows that the said defendant had long and habitually left the vestibule doors between the coaches of the said train open during its stay at the station at Marshall, Texas, and had permitted and encouraged passengers for the Shreveport train and from the Shreveport train and persons aiding passengers to the Shreveport train and guests leaving passengers at the Shreveport train and returning

to the station at Marshall and other portions of the town, and the public generally, to cross over the said train through the said vestibule openings; and that the said defendant knew that passengers and licensees and other persons at, around, and about the said depot were in the habit of constantly using the said vestibule openings as a passage way as aforesaid; and that the said defendant knew or was charged with the knowledge, and should have known, that plaintiff or other persons would probably be injured by moving the said train and starting the same suddenly without closing the said doors and without giving any warning or notice of an intention to do so; and notwithstanding the liability to inflict injury upon persons so crossing over the said train, that the said defendant started the same without closing said doors or giving any notice and negligently inflicted upon plaintiff the injuries complained of.

The plaintiff shows that in view of the notorious use of the said doors or openings between the coaches of said train as a passway to and from the said Shreveport train and the said station or depot, all of which was with the knowledge, acquiescence and consent of the defendant, that it was the duty of the said defendant Railway Company to have closed the said doors or openings before the said train was started or to have placed persons at convenient places to give warning to plaintiff and other persons crossing or about to cross said train of its intention to move the said train and to have caused timely notice and warning to be given of the intention to move the said train before making any movement therefor.

That the said defendant Railway Company did not close the said doors and did not give any notice of an intention to cause the said train to be moved and did not give any warning of the intention to move the same but without notice, and while the said plaintiff was descending from the steps, caused the said train to be suddenly jerked, lurched, bumped and moved in a negligent manner which caused the said plaintiff to be thrown and to fall from the said train and to be injured.

That the said plaintiff was thus injured by the negligence of the said defendant Railway Company in the manner herein set out and that for said injuries on account of the said negligence of the said defendant the plaintiff is entitled to recover damages herein.

The plaintiff shows that the said plaintiff had inflicted upon her and received as a result of the said fall the following injuries, to-wit:

That her right ankle was sprained, the ligaments thereof torn strained and bruised, and the bones thereof fractured, broken and otherwise injured, and that the bones of the said plaintiff's right leg were broken, lacerated, fractured and injured, and that the said injuries have totally disabled the plaintiff from the time of the injury to this date. That the said injuries are permanent and the plaintiff will never recover therefrom and that the same have left her foot and lower limb disfigured and twisted and the same will never recover its normal condition; that said injuries have caused a permanent impairment of plaintiff's gait, causing her to limp, and rendering her unable to walk without suffering great inconvenience; that the plaintiff by reason of the said injuries has suffered great mental and physical pain and will continue to suffer great mental and physical pain so long as she may live.

The plaintiff shows that by reason of the said injuries that she has been unable to perform and do any work and will not again be able to earn any money for many months or years, and will never be able to earn as much as she would have but for the said injuries; that at the time she was injured the said plaintiff was earning the sum of fifty-five dollars per month with prospects, hopes and promises of an early raise in said salary and that by reason of the said injuries the said plaintiff has had to expend large sums of money and incur large expense for doctors' bills, and nurse bills, and medical bills and for medicine and will continue to have to expend large sums of money therefor; that by reason of the said injuries, time lost, and time that will be lost in the future by plaintiff, medical attention, doctors'

bills, reasonable expenses for nursing and caring for the plaintiff, decreased ability to earn money in the future, mental and physical suffering that has been endured and that will be endured in the future by the plaintiff, the plaintiff has been damaged in the sum of twenty-five thousand dollars actual damages.

Wherefore the premises considered, the plaintiff prays that the defendant having answered herein, the plaintiff upon final hearing have judgment against the said defendant for the sum of twenty-five thousand dollars actual damages, for all costs of suit and for general relief.

S. P. JONES,
Attorney for Plaintiff.

Endorsed D. L. 592, Miss May Marcus vs. Texas & Pacific Railway Co.

Amended Petition filed Sept. 24, 1913.

J. R. BLADES, Clerk.

By W. E. SINGLETON, JR., Deputy.

A true copy of the original, I hereby certify.

J. R. BLADES, Clerk.

By W. E. SINGLETON, JR., Deputy.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS.

MAY MARCUS

ANSWER

vs.

TEXAS & PACIFIC RAILWAY COMPANY.

Now comes the defendant, the Texas & Pacific Railway Company and amends its answer and says.

1.

Now comes the Texas & Pacific Railway Company and demurs to plaintiff's petition and says same shows no cause of action.

2.

And for answer defendant denies each and every allegation in plaintiff's petition and says it is not guilty of the wrong charged against it.

3.

Defendant says that the plaintiff was injured at the passenger depot in Marshall under the following circumstances. The passenger depot at Marshall is situated on the south side of the track and just north of the depot is the main line running east and west and north of the main line is another track on which is stored passenger trains going east towards New Orleans.

At the time the plaintiff was hurt, there was a train standing on the north track called the New Orleans track, headed towards the east and the plaintiff accompanied her friends to the New Orleans train to see them depart, and while she was at the New Orleans track, the train from the west came in on the main line headed east, which placed this track in between the New Orleans train and the depot. Plaintiff had bid her friends good-bye and had desired to come across the main line to the depot, and found another train there which is called the Texarkana train between where she was and the depot. That she undertook to climb over the vestibule of the Texarkana train and just as she was getting down from the Texarkana train, it started in a backward motion to move out from the depot and proceed on its journey to Texarkana. While she was getting down she fell and received her injury.

4.

Defendant says that it is the ordinary and customary way of handling those trains, that is the New Orleans train is made up at Marshall and stands on the north track headed east. The train from the west comes in on the main line and after it has discharged its passengers, it backs out from the station and then proceeds northward towards Texarkana. That when the train from the west comes in on the main line, it is customary and necessary to have the vestibule on both sides of that train open so that persons com-

ing in from the west who desire to proceed towards New Orleans, may leave the train on the main line on the north side and proceed directly to the New Orleans train, and that there is a person standing there usually to inform persons coming in on the train from the west, that if they desire to take the New Orleans train, they should get off on the north side of the main line. That some persons do cross over the train if they find the train on the main line intervening between them and where thy want to go, but it is not usual or customary for ladies and children to cross over said cars, but it is customary and usual for such persons to either go around the intervening train or wait until it is taken out of the way. That on the occasion in question, the operatives of said train had no notice, knowledge or information or reason to believe that plaintiff was in the act of alighting from the train when they gave the signal to put it in backward motion, and that all persons desiring to disembark from said train had done so in safety and all persons desiring to board said train had done so in safety before the same was put in motion.

That there were several persons in company with the plaintiff, when they climbed over said train on the main line and none of them were injured except the plaintiff.

Wherefore, the defendant says that it was not guilty of any negligence or breach of duty that it owed to the plaintiff and that the plaintiff was guilty of negligence in undertaking to cross over the train on the main line without giving some information to the persons operating the train that she intended to do so.

The defendant further shows that the plaintiff undertook to pass over and across the intervening train and in doing so, she took upon herself and assumed the risk of being injured while passing over said train.

That the defendant's employes did nothing to induce her to cross over the train.

Wherefore she can not recover.

F. H. PRENDERGAST,
YOUNG & STINCHCOMB,
Attorneys for Defendant.

Endorsed. D. L. 592, May Marcus vs. Texas & Pacific Railway Co. Answer filed October 6, 1913.

J. R. BLADES, Clerk.

By W. E. SINGLETON, JR., Deputy.

A true copy of the original I certify.

J. R. BLADES, Clerk.

By W. E. SINGLETON, JR., Deputy.

JUDGEMENT MISS MAY MARCUS
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

On this, the 6th day of October, 1913, came on for trial the above cause, and both parties, plaintiff and defendant, appeared by attorney and announced ready for trial and thereupon came a jury of good and lawful men, to-wit, H. P. McGaughy foreman, and eleven others, who were duly empaneled to try the said cause and the said trial proceeded and continued from day to day until the 8th day of October, 1913, when the jury received the instructions given by the Court and retired to consider of their verdict and after having duly considered the same the jury thereafter returned into open Court the following verdict:

Jefferson, Texas, October 9, 1913. We the jury find for the plaintiff and assess damages at Six Thousand Dollars ($6000.00). H. P. McGAUGHY, Foreman.

It is therefore decided, adjudged and decreed that the plaintiff May Marcus do have and recover of and from the defendant the Texas & Pacific Railway Company the sum of Six Thousand Dollars together with all costs of suit.

Further ordered that this judgment bear interest at six per cent per annum from date, for all of which let execution issue. It is further ordered that execution may issue against each party for all costs by them respectively incurred. GORDON RUSSELL JUDGE

Endorsed: D. L. 592, Miss May Marcus vs. Texas & Pacific Railway Company.

Judgment filed October 9, 1913.

J. R. BLADES, Clerk.

By W. E. SINGLETON, JR., Deputy.

A true copy of the original I certify.

J. R. BLADES, Clerk.

By W. E. SINGLETON, JR., Deputy.

MAY MACUS

vs.

THE TEXAS & PACIFIC RAILWAY COMPANY.

SUIT PENDING IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, AT JEFFERSON, TEXAS.

TO THE HONORABLE, THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT:

Now comes the defendant, the Texas & Pacific Railway Company, and shows to the Court that error has been committed in the proceedings and trial and judgment rendered in the above cause to the damages of the Texas & Pacific Railway Company, as shown by the following assignments of error.

1.

The Court erred in refusing to give special charge No. 1 requested by the defendant as follows:

"The Jury are charged:

"In this case it cannot be held to be an act of negligence

for the Railway Company to have left the doors to the vestibule on the cars open at the time plaintiff and her companions attempted to cross over the car."

2.

The Court erred in refusing to give special charge No. 2 requested by the defendant as follows:

"The Jury are charged:

"The Plaintiff at the time she was injured did not stand in such relation to the Railroad Company as that she was entitled to receive notice of the intention to start the train. Therefore unless the person who gave the signal for the train to start, knew when he gave the signal that plaintiff was in the act of getting on the train and liable to be injured by the starting of the train, plaintiff can not recover."

3.

The Court erred in refusing to give special charge No. 3 requested by the defendant as follows:

"The Jury are charged:

"There is no evidence that the conductor who gave the signal for the train to start knew that plaintiff was in a position that the starting of the train would likely cause injury to her. Therefore you can not find for plaintiff on the ground that the conductor was negligent in starting the train when he did."

4.

The Court erred in refusing to give special charge No. 4 requested by the defendant as follows:

"The Jury are charged:

"The fact that numerous persons had at various times crossed over the train as plaintiff attempted to do would not make it the duty of persons in charge of the train to examine and see if any person was crossing over before he gave the signal to put the train in motion."

5.

The Court erred in refusing to give special charge No. 5 requested by the defendant as follows:

"The Jury are charged:

"It appears from the evidence that plaintiff was not induced to cross over the train by the fact that other persons at other times had crossed over it. Therefore the fact that other persons at other times had crossed over, can not be considered by you as evidence of defendant's liability in this case."

6.

The Court erred in refusing special charge No. 6 requested by the defendant as follows:

"The Jury are charged:

"In this case there is no proof that it was the duty of the Railway Company to have prevented the plaintiff from crossing over the vestibule of the car at the time she did so, and you can not find a verdict for plaintiff based on the fact that the Railway Company did not prevent her from crossing."

7.

The Court erred in refusing to give special charge No. 7, requested by the defendant as follows:

"The Jury are charged:

"There is no evidence that the vestibule doors on the train were left open for any persons except passengers getting on the train or going to the Shreveport train to become passengers thereon. And the plaintiff was not in a position to demand the right to use the vestibules."

8.

The Court erred in refusing to give special charge No. 8, requested by the defendant as follows:

"The Jury are charged:

"The plaintiff had no right to demand the use of the vestibules on the cars.

"When she desired to use them it was her duty to notify the persons in charge of the train, that she desired to use

them, if she desired the men in charge of the train to look out for her safety while crossing."

9.

The Court erred in refusing to give special charge No. 9, requested by the defendant as follows:

"The Jury are charged:

"You are charged to return a verdict for the defendant."

10.

The Court erred in refusing special charge No. 10, requested by the defendant as follows:

"The Jury are charged:

"You are charged that if you find from the evidenec that Conductor Fowler called "All aboard" before the train started, and in the usual manner and usual voice it was called by him, and in the usual time before starting his train, you will find for the defendant."

11.

The Court erred in refusing to give special charge No. 11, requested by the defendant as follows:

"The Jury are charged:

"You are charged that people crossing the platform of the cars by going from the south side of them to the north side would not be notice to the defendant's conductor that people would cross the platform of the said cars by going from the north side of them to the south side of them, therefore if you fail to find that a sufficient number of ladies prior to October 15, 1911, crossed from the north side of the train to the south side thereof by going over the platforms of the cars to cause a person of ordinary care situated as Conductor Fowler was, to reasonably contemplate or foresee that some lady or ladies might undertake to cross the platforms of the cars as the train was due to leave, there would be no duty on the part of Conductor Fowler to give notice to the plaintiff or any of her party that the train was going to move."

12.

The Court erred in refusing to give special charge No. 12, requested by the defendant as follows:

"The Jury are charged:

"You are instructed that the fact that the plaintiff received an injury at the hands of the defendant company would not, of itself, entitle her to recovery, but before she can recover, it is her duty to prove by a preponderance of the evidence that her injury was the direct and proximate result of some negligence on the part of the conductor or engineer of the train she fell or jumped from and received her injury, and if you fail to so find, you will return a verdict for the defendant. And you are further instructed in this connection that an act committed by either of them or an act omitted by either of them would not be negligence unless you find that a person of ordinary care, under the same circumstances, could reasonably have anticipated or foreseen that such an act committed, or such an act omitted, might result in injury to someone, and if you fail to so find, you will return a verdict for the defendant.

13.

The Court erred in refusing to give special charge No. 13, as requested by the defendant as follows:

"The Jury are charged:

"You are charged that it could not be negligence for the engineer to start the train with a jerk unless you find from the evidence that person of ordinary care, situated as he was could reasonably have contemplated or understood that the plaintiff or some other lady might be passing over the platform of one of the cars of the train, and if you fail to so find, you will consider that the engineer was not guilty of any negligence in starting the train with a jerk; if you find that he did start it with a jerk."

14.

The Court erred in refusing special charge No. 14, requested by the defendant as follows:

"The Jury are charged:

"You are instructed that if you find from the evidence that the conductor called "All aboard" before he gave the engineer the signal to start the train, and that he so called in the usual tone of voice, or if you find that the engineer rang the bell or started it to ringing before he started the train to moving, you will find for the defendant.

15.

The Court erred in refusing special charge No. 15, requested by the defendant as follows:

"The Jury are charged:

"You are charged that if you find from the evidence that men crossed from the north side of the cars to the south side by going over the platforms, and that they did so to the extent that they made it a custom, this would not make it the duty of the operatives of the train to watch out for or warn ladies that the train was going to move, and before you can find that it was the duty of operatives of the train to look out for or warn the plaintiff that the train was going to move you must find by preponderance of the evidence that ladies had been in the practice of crossing from the north side of passenger train No. 2 to the south side thereof by crossing over the platforms of the cars to such an extent that it became a custom and that a person of ordinary care, situated as the conductor of that train was on that date, could reasonably have understood that some lady might be crossing over the platform of a car from the north side of the train to the south side thereof, and if you fail to so find you will find for the defendant, regardless of whatever else you may find."

16.

The Court erred in refusing special charge No. 16, requested by the defendant as follows:

"The Jury are charged:

"You are instructed that if you find from the evidence that either A. Marcus or the plaintiff, before starting over the platform of the car, knew that the train was likely to move at any time, and knew the dangers of being on the platform of the car when the train would move or that either one of them in the exercise of ordinary care for the safety of the plaintiff, must necessarily have known that the train was likely to move at any time, and the dangers arising therefrom you will find for the defendant, regardless of whether any warning was given that the train was going to move or not."

17.

The Court erred in refusing special charge No. 17, requested by the defendant as follows:

"The Jury are charged:

"You are instructed that if you find from the evidence that the plaintiff, before starting to cross over the platform of the car, knew that the train was likely to move at any time, and knew the dangers of being on the platform of the car when it moved, or that, in the exercise of ordinary care for her own safety she must necessarily have known that the train was likely to move at any time, and the dangers arising from being on the platform of the car when it moved, you will find for the defendant, whether you find that there was any warning given that the train would be moved or not."

18.

The Court erred in refusing special charge No. 18, requested by the defendant as follows:

"The Jury are charged:

"You are instructed that if the conductor did not give

notice that the train was going to move, or that the engineer did not ring the bell of the engine, it would not be negligence, because there is no evidence that either the conductor knew that the plaintiff was in the act of crossing the platform of the car."

19.

The Court erred in refusing to give special charge No. 19, requested by the defendant as follows:

"The Jury are charged:

"You are instructed that if the engineer did start the train with a jerk or jar at the time in question, it would not be negligence, because there is no question that the engineer knew or had reason to believe that the plaintiff was in the act of crossing the platform of the car."

20.

The Court erred in refusing special charge No. 20, requested by the defendant as follows:

"The Jury are charged:

"You are charged that if you find from the evidence that when the plaintiff attempted to cross over the train she knew or had reason to know that the train might start at at any time you will find for the defendant."

21.

The Court erred in refusing to give special charge No. 21, resquested by the defendant as follows:

"The Jury are charged:

"You are instructed that before you can find for the plaintiff in this case you must find by a preponderance of the evidence the following:

"1st. That the defendant company, through the conductors of its passenger trains, had allowed the custom to be established at its station at Marshall, Texas, for persons to cross through the vestibules of its passenger cars from the

north side of the main track at said place to the south side thereof, and that such custom was in force on and prior to October 15, 1911.

"2nd. That on and prior to said date it was customary for ladies to cross over passenger trains on the defendants main track at Marshall, Texas, from the north side thereof to the south side of the same, and that they crossed over by going through the vestibules of the coaches.

"3rd. That the conductors of the defendants passenger trains knew of these customs, if there were such customs, and that the defendant Conductor Fowler, knew of such customs, if any.

"4th. That the defendants conductors in charge of its passenger trains consented or acquiesced in persons and ladies crossing through the vestibules of passenger trains on the main track of its depot at Marshall.

"5th. That Conductor Fowler, did not call all aboard on the night of the injury to the plaintiff before he started the train.

7th. That the whistle of the engine was not blown, nor the bell thereof rung before the train started.

8th. That the failure, if any, on the part of Conductor Fowler to call all aboard was negligence, or that the failure, if any, of the operatives of the engine to blow the whistle or ring the bell was negligence.

"9th. That the negligence, if any, of Conductor Fowler, or the negligence, if any, of the operatives of the engine, in not calling "All aboard" or in not ringing the bell or blowing the whistle of the engine if you find that none of these warnings were given, was the proximate cause of the plaintiff's injury.

"If you fail to find any one of the foregoing issues in favor of the plaintiff you will find for the defendant, and you will also find for the defendant if you find either of the following facts:

"1st. If you find that the plaintiff, in crossing over the platform of the car at the place and under the circumstances she did, did something that a person of ordinary

care and prudence would not have done under the same circumstances, you will find for the defendant, regardless of whether or not you find that any signals were given that the train was going to move, and regardless of whether you find or not that the defendant or any of its agents were guilty of any negligence.

"2nd. If you find that A. Marcus, the father of the plaintiff, in causing the plaintiff to cross over the platform of the car, did something that a person of ordinary care and prudence would not have done under the same circumstances, you will find for the defendant, because the negligence of A. Marcus, if any, under the circumstances, would be chargeable to the plaintiff.

22.

The Court erred in charging the Jury as follows:

"Applying the propositions I have announced to the facts in evidence before you, if you find from a preponderance of the testimony in this case that the plaintiff, Miss May Marcus, on the occasion in question, was returning from the New Orleans train of the Texas & Pacific Railway Company to the station of that company or to her home in crossing the Texarkana train of the defendant company, she was thrown to the ground and injured, as claimed; and if you further find from a preponderance of the evidence that the operatives in charge of the Texarkana train either knew that Miss Marcus was about to board the train for the purpose of crossing it, or if from all the circumstances before you you believe that by the exercise of ordinary care they could have discovered that she or some one else might be reasonably expected to attempt to cross the Texarkana train at that time and place; and if you further find from the preponderance of the evidence before you that the operatives in charge of the Texarkana train failed to close the vestibule doors and started the train without giving any signal or warning that they expected to set it in motion, and if you further find from a preponderance of the evidence that the train started, Miss Marcus being upon the

train under those circumstances, by a sudden jerk or jar and she was thrown to the ground and injured and you further find from all the evidence before you that the acts of failing to close the vestibule doors and failing to give proper signals that the train was about to be set in motion and starting the train with a sudden jerk or jar, taken individually or collectively, amounted upon the part of the operatives in charge of the Texarkana train to a failure to exercise ordinary care, that is such care as a person of ordinary prudence would have exercised under similar circumstances, and that this failure was the direct and proximate cause of her being thrown to the ground and injured, then plaintiff would be entitled to recover."

This charge was error because there was no evidence that the persons operating the train knew that plaintiff was about to board the train for the purpose of crossing it.

Second. It is further error, because the evidence did not show that by ordinary care those persons in charge of the train could have discovered that the plaintiff might be reasonably expected to attempt to cross the Texarkana train at that time and place.

Third. It is error because it was not the duty of the operatives of the train to do anything to ascertain whether the people were attempting to cross his train from the opposite side in the absence of something to show that he had reason to expect the persons would be crossing.

Fourth. It was error to submit the question of the sudden jerk or jar of a train, because there was no evidence to justify the jury in concluding that the jar or jerk of the train was sufficient under the circumstances of this case to constitute negligence.

23.

The Court erred in charging the Jury as follows:

"In this case the Court had admitted in evidence before you the custom of the people of Marshall of crossing the vestibules of the Texarkana train for the purpose of going to and returning from the New Orleans train to the depot of

the defendant company and various homes and places of business in Marshall. The Court informs you that you may consider this testimony as to the custom prevailing in Marshall in reference to crossing the vestibules of the Texarkana train in determining whether it was negligence on the part of the operatives of the Texarkana train in starting the train at the time plaintiff was injured, that is, whether the operatives of the Texarkana train knew or by the exercise of ordinary care might have discovered that plaintiff or some one else might attempt to cross the train at that time and place, and that the starting of the train would place them in danger. All the testimony in reference to the custom may be considered by you as bearing on the question of whether the operatives in charge of the train were guilty in starting the train at the time Miss Marcus boarded it."

This was error because there was not any evidence that the plaintiff knew of this custom of people crossing the train as she did, or that she relied on said custom when she attempted to cross the train, and the consideration of the custom of other people crossing the train in that way would not aid the jury in determining whether the defendant company was negligent with reference to the plaintiff.

24.

The Court erred in charging the Jury as fololws:

"I further instruct the Jury that the evidence that the vestibules of the Texarkana train were left open, and that had been the custom that had prevailed at Marshall, and that people had been crossing the Texarkana train in going to the New Orleans train and returning to the station and to their homes may be considered by you in passing upon the question of whether the plaintiff, Miss Marcus, was guilty of contributory negligence in attempting to cross the train thrugh the vestibules at the time she fell from it and was injured, it being a question in the case as to whether in making the attempt to cross the Texarkana train she was guilty of contributory negligence, and the Court has admitted the testimony that it was the custom to leave the vestibules

open so that the Jury might consider it in determining whether the plaintiff was guilty of contributory negligence in attempting to cross the vestibule."

This was error because the fact that the doors of the vestibules were left open could not properly be considered by the Jury on determining whether the plaintiff was guilty of negligence or not, because the evidence shows that it was proper to leave the vestibules open in order that the poeple might leave the Texarkana train on the north side to go and board the New Orleans train, and there could not be any impropriety charged against the Railroad Company for leaving the vestibule open, and there is no claim that said vestibules were left open as an invitation to the people situated as plaintiff was situated to cross over the Texarkana train in coming from the New Orleans train.

26.

The Court erred in admitting in evidence the statement of Dr. Bennett, as follows:

"I give it as my opinion that the injury to the plaintiff will last through her life. I don't know her age but she is a young lady just grown. I base my opinion on the history of similar cases I have read about. I have not lived long enough to personally observe whether they last a life time. I give that opinion from what I have learned from the books."

The defendant moved to strike out the opinion of the witness based on his knowledge acquired from the books, because the same is irrelevant and immaterial and not the proper basis of expert testimony and because the jury, lawyers and Court could acquire the same information by reading the books. The Court erred in not sustaining said motion to strike out said testimony.

Wherefore defendant prays for a writ of error and that the amount of supercedeas bond be fixed.

F. H. PRENDERGAST,
Attorney for Defendant.

Writ of error allowed and supercedeas bond fixed at $10,000.00.

GORDON RUSSELL, Judge.

Endorsed. D. L. 592, Miss May Marcus vs. Texas & Pacific Railway Co.

Assignment of Erors, filed February 19, 1914.

J. R. BLADES, Clerk.

By W. E. SINGLETON, JR., Deputy.

A true copy of the original I certify.

J. R. BLADES, Clerk.

By W. E. SINGLETON, JR., Deputy.

IN TH EDISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS,
AT JEFFERSON.
MAY MARCUS
No. 592. Vs.
THE TEXAS & PACIFIC RAILWAY CO.

KNOW ALL MEN BY THESE PRESENTS, That we, THE TEXAS & PACIFIC RAILWAY COMPANY, a corporation duly incorporated and organized under and by virtue of an Act of Congress of the United States, as principal, and J. H. Ardrey and E. R. Buddy as sureties are held and firmly bound unto May Marcus in the sum of Ten Thousand Dollars, to be paid to the said May Marcus, her executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents, sealed with our seals, using scrolls for seals, and signed with our names, this the.....day af January, 1914.

The condition of the foregoing bond is such, that, whereas, lately at a term of the District Court of the United States, for the Eastern District of Texas, at Jefferson in a

suit pending in said Court, between May Marcus, plaintiff and THE TEXAS & PACIFIC RAILWAY CO., DEFENDANT, numbered 592 on the docket of said Court, a judgment was rendered on the 8th day of October, 1913, that the plaintiff, May Marcus, should have and recover of the defendant the sum of Six Thousand Dollars with six per cent per annum thereon from date of rendition, as well as all costs of suit; and

Whereas, said THE TEXAS & PACIFIC RAILWAY CO. has obtained a writ of error, and has filed a copy thereof in the office of the Clerk of said Court to reverse said judgment, and also a citation directed to said May Marcus and her Attorney of Record, S. P. Jones, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Fifth Circuit to be holden at New Orleans, La., within thirty days from the date thereof.

Now, if the said THE TEXAS & PACIFIC RAILWAY COMPANY shall prosecute its writ of error to effect, and answer all damages and costs, if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

THE TEXAS & PAPCIFIC RAILWAY COMPANY. (Seal)
By F. H. PRENDERGAST, Attorney. (Seal)
J. H. ARDREY.
E. R. BUDDY.
Approved: GORDON RUSSELL.

Endorsed. D. L. No. 592. Miss May Marcus vs. The Texas & Pacific Railway Co. In the United States Circuit Court for the Eastern District of Texas at Jefferson.

WRIT OF ERROR BOND.
Filed 19th day of February, 1914.
J. R. BLADES, Clerk.
By W. E. SINGLETON, JR., Deputy.
A true copy of the original I certify.
J. R. BLADES, Clerk.
By W. E. SINGLETON, JR., Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS,
AT JEFFERSON.

MISS MAY MARCUS

vs.

TEXAS & PACIFIC RAILWAY CO.

No. 592.

BILL OF EXCEPTIONS.

Be it remembered that on the trial of the above entitled and numbered cause, in the District Court of the United States for the Eastern District of Texas, at Jefferson, on October 6, 7 and 8, 1913, the following evidence was introduced, proceedings had and exceptions reserved, to-wit:

DR. W. H. BENNETT TESTIFIED FOR THE PLAINTIFF:

I reside at Marshall, Texas, and have lived there about eight years. I am now and during the time of my entire residence at Marshall have been engaged in the practice of medicine. I belong to what is called the osteopathic school, and the practice consists principally in the manipulation of the muscles and joints. If there is an injury to the joint the method of treatment is by manipulation and massage; we generally manipulate the joint, but if it is irritated and inflamed, we do not manipulate it. My practice of manipulation has to do with an injured joint, especially after the acute stage of inflammation has passed. I am acquainted with the plaintiff, Miss May Marcus. I have had occasion to treat her. She first came to see me about February, 1912. I think she came to me at the suggestion of Dr. Rains. My information was that she had received an injury to the right ankle and the bones above the ankle. I made a physical examination of the foot and ankle. I found it was swollen and stiff, and had the appearance of soreness

and inflammation when I first saw her. I gave her ankle and foot treatment by manipulation and massage, which is a recognized treatment for that of trouble. I continued to treat Miss Marcus something like eight or ten months. I then told her that I had done all for her I could, had continued the treatment as long as I thought it would do any good. When I discontinued my treatment, there was some stiffness in the ankle joint and the tarsus joint. The tarsus joint is just below the ankle joint and is what gives the side motion to the foot, and is between the heel and instep. There was stiffness in both the ankle joint and the tarsus joint. At the time I quit treating her there would be swelling of the foot, and it seemed to come with the changes in the weather, or perhaps late in the evening, I am not sure.

The up and down motion in the ankle joint should be about 90 degrees, and in the case of the plaintiff it is about half that or may be a little more, and the lateral or side motion of the foot was almost entirely absent. If the plaintiff is walking at an ordinary gait, the condition of her foot and ankle makes her limp some. There is not swing enough in the foot to walk without limping. I presume she can walk very slowly on the floor without its being noticeable. At times the plaintiff complained of pain in her foot and ankle. It is a frequent symptom in injuries of that kind for the patient to suffer with neuralgic pains, and sometimes these pains will continue throughout life if the joint is left stiff as in this instance, and as old age comes on there will more than likely be pain present in the joint, especially in changing weather. In my opinion the present condition of the plaintiff's foot and ankle will not improve. Of course it is merely my opinion, but I do not expect any more improvement. I examined the plaintiff's foot and ankle one day last week, and the condition now is very much the same as it was when I quit treating her. The stiffness is still present and there is practically no lateral motion of the ankle and foot. The foot is larger than the other one. The flesh is puffed. It is not exactly what you would call a swelling, but rather a stationary enlargement of the foot.

I would judge that foot to be something like ten per cent larger than the other one, and it is larger in the evening than in the morning. When she has been standing on her feet, it is larger. My bill for treatment of the plaintiff was from $125.00 to $150.00, I don't remember the exact amount. The plaintiff did complain of pain in her foot during the time I treated her. At times it was very painful and at other times did not seem to bother her very much. I am a believer in the theory that the condition of the weather has something to do with pain. One might as well believe in it, for it is true. In an injury of this kind there will be neuralgic pains in changing weather. A change in the weather will make the pain more acute.

CROSS EXAMINATION:

It is a fact that the weather has less effect on persons of perfect vitality than on persons with reduced vitality. I could not say whether there was a distinct break of the ankle bone or not. I could not tell it if there was. I don't know that I could have told it if there had been a break in the ankle bone. Sometimes you can not tell. I saw a radiograph of the leg and ankle. It showed the broken bone of the leg above the ankle joint. I could not discover the place where the bones had been broken at the time I commenced treating her from a physical examination. The condition I saw when I commenced to treat her did not disclose to me that there had been a break. I found stiffness of the ankle joint itself. There was nothing on the surface to show the pain of which she complained. I found a condition that could not have resulted from anything else except external force to the ankle. There was a stiffness of the ankle joint, and the ankle was twisted a little. I could not tell from the radiograph whether there had been an actual injury to the ankle joint. I can give you my idea as to what made the ankle joint stiff. My examination was for the purpose of ascertaining her condition before I treated her. I found the ankle joint swollen and stiff. One who

was not a physician could have discovered that. It did not take expert knowledge to find that the ankle was swollen and did not take expert knowledge to find it was stiff. I had knowledge of what would produce stiffness that a non-expert would not have. I presume I did not discover anything about the ankle that one not a doctor could not have found. When I first began treating her I gave the foot lateral manipulation and massage. I rubbed it and manipulated the joint. That treatment seemed to reduce the swelling and increase the motion to some extent. Plaintiff was able to walk when she came to me. I continued the treatment I have described for the first two or three months and for the next two or three months there was very little change in the method of treatment. There was very little change in the condition of the foot and ankle and I kept on manipulating and massaging it. I do not remember how long it was after I began treating her until she could walk as well as she does now, but it was within a few months. When I examined the foot last week I could not detect where the break was in the ankle. As far as a break in the bone was concerned, that was entirely cured.

RE-DIRECT EXAMINATION:

In massaging and manipulating the ankle I take the foot and extend it as far as I can and then the other way as far as I can, and get the lateral motion as much as I can and massage the joint. That is the treatment I gave the plaintiff. That is for the purpose of breaking down the adhesions and cause the foot to get in as nearly normal condition as possible. I kept that treatment up eight months. Young persons of good vitality suffer less from barometric changes than older persons. The suffering of a young person will tend to grow more intense as that person's years increase.

RE-CROSS EXAMINATION:

In a normal joint where there is no inflammation or soreness, the process of manipulation and massage does not oc-

casion pain. The manipulation of the joint which I have described is about the same motion used in walking or perhaps a little more. The lateral motions are not used in walking as much as I gave the joint in manipulating it. There would be a rotation of the foot in walking on an uneven surface. Rotation means around and around.

RE-DIRECT EXAMINATION:

An injured joint has a greater susceptibility to injury than a normal one, and that susceptibility will continue as long as the ankle is abnormal. In this cause in my opinion the injury to the ankle and foot will continue throughout life.

RE-CROSS EXAMINATION:

I give it as my opinion that the injury to the plaintiff will last throughout her life. I don't know her age, but she is a young lady just grown. I base my opinion on the history of similar cases I have read about. I have not lived long enough to personally observe whether they last a life tiem. I give that opinion from what I have learned from the books.

THE DEFENDANT MOVED to strike out the opinion of the witness based on his knowledge acquired from the books because the same is irrelevant and immaterial, not the proper basis of expert testimony and because the jury, lawyers and court could acquire the same information by reading the books. This motion was overruled by the court, and the testimony permitted to remain with the jury for their consideration. To this action of the court defendant in open court excepted and tenders this its bill of exception.

RE-DIRECT EXAMINATION:

I am a graduate of the American School of Osteopathy at Kirkville, Mo. I presume that would be called a medical college.

DR. G. P. RAINS, A WITNESS FOR THE PLAINTIFF TESTIFIED:

Live at Marshall and have resided there 41 years. I am engaged in the practice of medicine and have practiced 16 years. I am a graduate of the medical department of the University of Texas and also a graduate of the University of Pennsylvania. I know the plaintiff and remember the circumstances of her receiving an injury at the depot of defendant in Marshall about two years ago. I was called to her home early in the night to see her; this was the same night she sustained the injury. Some member of the family called me to see her. I found her suffering with what is called a "Potts Fracture," which is a fracture of the bones of the leg just above the ankle. By a fracture I mean a broken bone, either partial or complete. This was a complete fracture of the small bone on the outside of the leg, and a fracture of the end of the large bone or tibia and then a dislocation of the ankle with a tearing of the ligaments. This Potts Fracture was just above the ankle joint within a half inch of the ankle joint, and the small bone was broken two and a half inches above that. The ankle joint was dislocated upward. The right foot was carried out and a little backwards as a result of the dislocation of the ankle joint. I do not exactly remember the injury to the joint of the foot mentioned by Dr. Bennett. At the time the whole joint and the foot was swollen considerably. At that time Miss Marcus was quite a fleshy young lady, and the whole foot was swollen. I put the ankle and lower part of the leg in an open plaster of Paris splint, and kept it there I suppose six weeks, taking it off occasionally and replacing it. I was giving her what I thought was the best treatment for the fracture. I was treating her as a physician trying to help her, and not as an expert with a view to becoming a witness in this case. I continued to treat her and look after her on from that time for four or five months; I saw her different times and gave directions about the management of the case. She was confined to her bed six weeks or two

months and perhaps longer than that, I don't remember exactly. The trouble was a little slow in yielding to treatment. The whole injury was a little slower than usual in recovering and healing. I gave the trouble the treatment that my education and experience had taught me it should receive, and she followed my instructions and directions. At the time plaintiff suffered considerable pain from her injury, and then afterwards she suffered some pain. While she was in bed she suffered pain and after she got up she suffered at times up to the time I ceased treating her. I examined her last week and found subjective symptoms of pain. I advised the plaintiff to go to Dr. Bennett for the purpose of receiving massage treatment, which is a recognized treatment for that character of trouble. In my judgment that was the best treatment for that case at that time. I could have massaged her myself, but not so well as an expert. I could have administered that character of treatment myself, but did not think it would be as good as Dr. Bennett could give her, he being an expert in that kind of treatment. He has been educated along that line, and that is the reason I sent the plaintiff to him. Mr. Marcus asked me if I wanted to examine the plaintiff before I went upon the witness stand for the purpose of ascertaining her present condition, and I did so examine her. I found the ankle somewhat larger than the other one, and there is some impairment of the forward and backward motion and considerable impairment of the lateral or side to side motion. I considered it a case of impaired motion due to the enlargement around the bone. In my opinion the foot and ankle will not go much further towards recovery than it is at the present time. It has been two years since the injury and nature has done about all I expect her to do for the foot. I still get a history of suffering, but I do not think the suffering is constantly present. I think she has what is called barometrical or weather pains and I think she suffers at other times too. Weather conditions do cause pain from injuries of this character. I would consider from the history of the case that plaintiff would continue to suffer pain

at times. That is the general history from conditions of that kind. All fractures do not continue to hurt but a great many do. It is more likely to hurt in the joint than in other places. That joint would be more susceptible to injury in the future than would a normal joint. The extent of the suffering of the plaintiff during the time she was in bed is not very distinct in my mind. I know that in this kind of injury they suffer a great deal, but the extent of the sufferings of the plaintiff is not so definite in my mind. It is my opinion that she did suffer. To the best of my knowledge she did. My testimony with reference to her suffering is based upon the fact that it is the natural course in cases of that kind, and it is apart from that fact my recollection that she did suffer.

CROSS EXAMINATION:

The outside bone was broken about two inches above the ankle. The other bone projects down over the ankle joint, and the bone from below goes between the two bones that come down from above, and this bone was broken off about level with the joint is my idea of the case. The break inside was on the bone that goes from the ankle to the foot, the large bone there on the inside. The break was not in the bone that goes from the ankle to the foot; that bone was not broken. The break on the outside was of the leg bone and the foot was forced out, forced outward and a little backward. The bone that united with the two bones above was not broken at all. The outside bone that goes from the ankle to the foot was not broken, but the ligaments there were torn in the foot. The ligaments hold the bones together. The two bones from above come down a little below the ankle joint, and the bone from below comes up and fits between the two upper bones and the ligaments hold the joint in place. When a bone is put in proper place the ligaments usually repair. There was no break in any of the bones from the ankle down. The union of the outside bone broken about 2½ inches above the ankle was shown by the X-Ray to be good. There is some enlargement around the

union, but most of it was absorbed. The bone healed there pretty well. When I put the artificial bandage on it was for the purpose of bringing the bones together, and then when the bandage was put on the bone began to throw out a callous around the break which is a part of the method of repair, and after the bones unite nature absorbs the callous. I don't think all of the callous will absorb. There is considerable callous left there yet. I don't think the break of the small bone interferes with the motion of the joint at all. I don't think there is any trouble from the break of the small bone; that is outside of the joint altogether. There is often a good union of the bone whether the ends come end to end or not. These bones are end to end. In addition to having a good union of the small bone, we have good position. If it was not a perfect union with perfect position, the X-Ray did not show it. That is called perfect apposition which means that the ends of the bones come exactly together. The injury of the other bone, the end being broken off, to my mind account for most of the enlargement of the joint now and the impaired motion. The movement of the ankle affects the callous which formed there, and consequently it would take longer to repair than the other place. The end of the bone was broken off and it came together and formed a fairly good apposition. There was considerable callous there, new bone thrown out. It was in as good apposition as you expect in that kind of injury. It was near the joint and the manipulations of the joint would affect it, and that would also make it harder to get in proper apposition. In this instance I got a good apposition. The fact that it was at that place would take it longer to form a proper union. The union there is good. The apposition is good and the union is good. The usual course is that as the swelling lessens the enlargement will reduce up to a certain time. I consider that about a year would be the proper time to get most of the function of the joint back. As a bone repairs and makes a good union, the callous originally thrown out gradually absorbs; that is the usual course of nature. In any kind of injury occurring to a person in good

health the usual course is to repair as much as possible. If you cut the flesh, nature makes another channel for the blood vessels to repair. That is true with reference to the course of injuries to bones and joints—nature tries to repair everything. Miss Marcus can walk now. My recollection is that she was in bed from six weeks to two months. When she got out she had to use crutches at first. I do not recollect how long she used crutches. I quit seeing her very much after Dr. Bennett took charge of her. The bones of the ankle were placed by me in the position they should have been and they remained in place and are in place at this time. I think there is a deformity there, more of an upward turning of the bones than there ought to be—rather an outward turning I should have said. Dislocated bones when placed in proper position and properly treated will remain in proper position, will have a tendency to heal and repair the ligaments. I have known instances where the clavicle would be a half inch or more out of place and heal and the use of the arm be left. The foot is turned a little outward. The foot is just a little out of the normal line. I told the plaintiff to have the side of the sole of her shoe enlarged to protect the foot and I think she did that. It is my recollection that when I examined her last Friday she had the same kind and size shoe for one foot as for the other.

RE-DIRECT EXAMINATION:

Possibly she does not wear the same kind of shoe on both feet. My advice was to get a shoe with an enlargement on that side. A man's shoulder could be dislocated and not put back in proper position and he would get a union there, and he would not get all the power he had before, but would have a good useful limb there. I would not recommend treating a fellow that way. I saw an X-Ray of plaintiff's foot and ankle. It was taken at the Texas & Pacific Hospital in Marshall. I carried her there myself for that purpose and had the picture developed after it was taken. That was about three months after she was in-

jured. I stated to counsel for defendent that up to a certain time the callous around the break would reduce by absorption. If it is not entirely absorbed within a year after the injury, the process of absorption will stop and the enlargement remain. After a period of two years from the injury, I would not expect any reduction of the enlargement. The ligaments were torn at the joint.

Q. You put the joint back in as good a position as you could considering the fact that the break was so close to it?

To this question the defendant objected because the same was leading and suggestive. This objection was overruled by the court and the witness permitted to answer "Yes sir." To which action of the court defendant excepted and now tenders its bill of exception. The slight outward turning of the foot is probably due to the position in which the ligaments grabbed the bone when they united. The ligaments are the membranes that unite bone to bone and hold them together. They reach across the joint from one bone to another. I took plaintiff to the hospital and had the X-Ray made for my own information to see what the condition of the joint was.

A. MARCUS, A WITNESS FOR PLAINTIFF, TESTIFIED:

Live in Marshall and have resided there nearly thirty years. Miss May Marcus, the plaintiff, is my daughter. On or about October 15, 1911, my daughter received an injury at the depot of the defendant in Marshall. I was at the depot at the time. We had accompanied Mrs. Henry Winters and her two children to the depot. She lived at Shreveport, La., and went to the depot for the purpose of going home on the Shreveport train. Mrs. Winters is my wife's niece, and the daughter of Mr. Mose Weisman, and Mr. Weisman is my wife's brother. In the party that accompanied Mrs. Winters to the train were Mose Weisman, Louis Kariel, Mrs. Wolf and my two daughters and myself. The depot was on the south side of the railroad tracks. The railroad running from Marshall to Shreveport runs out of

Marshall to the east, and the railroad running from Marshall to Texarkana runs out of Marshall to the north. The train at the depot in Marshall at that time that was going to Texarkana would back out from the depot west a certain distance, and then switch off on the line that goes north, and the train that was going to Shreveport was made up at Marshall and was headed east. On this particular occasion the train for Shreveport was standing on the north track and north of the depot, and it was practically in front of the depot. That is the train that Mrs. Winters was to leave on. The persons I have named accompanied Mrs. Winters and her children to that rain. We saw her placed on the train. Mrs. Winters was carried to the Shreveport train before the train known as No. 2 going to Texarkana came in. When the train came into Marshall which was going to Texarkana the party of which I was a member was between the Shreveport train and the Texarkana train, and about six or seven feet from the Shreveport train. After the Texarkana train came in my daughter and I started back towards the depot, towards home, from the Shreveport train. Our home is on the south side of the track. The principal part of the city of Marshall is on the south side of the defendant's tracks. Marshall at that time had 12,000 or 13,000 inhabitants. It was nearly eight o'clock at night when we started from the Shreveport train south to our home, and it was dark. The Texarkana train, No. 2, was between us and our home, and also between us and the depot. The engine of the Texarkana train must have stood close to the Elgin hotel; there were six or seven coaches in the train, and the rear end of the train extended back west of the Ginocchio Hotel. The drawing which you exhibit to me shows in a general way the situation of the two trains and shows the position of the depot, the Ginocchio Hotel and the Elgin Hotel. Just west of the Elgin Hotel is a street that runs south known as Bolivar Street and just east of the Ginocchio Hotel is Washington Avenue. The main thoroughfare from the depot to the town both for persons walking and those in vehicles was Washington Avenue. We started from the north side of

the Texarkana train to our home south of the track. We had to cross the Texarkana train. The Texarkana train was made up of a number of coaches and a baggage car and an express car. There were vestibules at the place where we started to cross the Texarkana train. By vestibule is th enclosure between two coaches, and the doors of the vestibule where we started to cross the Texarkana train were open on the north side. I was ahead in crossing the Texarkana train and I passed through between the coaches and down the step. The train was started before all my party got across. I had gotten off before the train started and helped my youngest daughter off, and was standing there to help the others off when it started. My youngest daughter, Miss Adrian was followed by Miss May, the plaintiff, close behind her. Miss May Marcus was on the steps of the coach just about to alight when the train gave a jerk and she fell; she was about ready to step off. The train started back very suddenly. I did not pay much attention to it, but I noticed the train started with a jerk, and that is how plaintiff came to fall. We had no notice that the train was about to start. No signals of any kind had been given; I did not hear any. I did not see any train employes on the north side of the vestibule opening. I did not hear anyone say anything about the train going to start. I did not hear a word of that kind. I heard neither whistle nor bell sounded, nothing at all. Plaintiff fell right by the steps of the train, right straight down. I was right in front of her at the time. I tried to pull her away to keep her from being run over by the train. The train was then backing up. I tried to get her up and she could not get up. She said, "Papa, I am hurt." She could not walk. There was a friend of mine there and I got hi mto take her home in an automobile. A good many came to her assistance. We just helped her into the automobile and carried her home, and called a doctor. She was placed under the treatment and care of Dr. Rains. I think she was confined to her bed six or seven weeks, and we helped her around in an invalid chair for a time and then she used crutches. She was in an

invalid chair quite a while and a long time on crutches. I don't know whether she was on crutches when Dr. Bennett began to treat her or not. I believe I paid Dr. Rains $150 for his services in attending my daughter. For the first few days and nights after plaintiff was hurt she suffered intensely, and for several weeks when the limb was moved it was very painful to her. She suffered a great deal up to the time she got out of bed and she suffers yet; she is in pain yet all the time; her foot hurts her all the time. After she laid her crutches aside she could not walk without limping, and she limps yet. She was not carried to the hospital, but was confined to her bed at home and the family took care of her. At the time of the injury the Shreveport train would wait for the Texarkana train to arrive before it pulled out. The Texarkana train was known as No. 2. From the time of the arrival of No. 2 and the departure of No. 2 and the departure of the Shreveport train, a great many people frequented the depot. In going from the south side of the town to the north side of the town afoot the people would come down Washington Avenue and cross the tracks, right out from the end of Washington Avenue. People traveling from the south go north on Washington Avenue and when they got to the railroad track they would be on Washington Avenue. The tracks of the defendant there are right near the Ginocchio Hotel. They would cross the tracks there. There is an office built there in what is known as the Y about the mouth of Washington Avenue, and the people going to the south side would pass on the left side of the office. From there some walked on the track towards Texarkana and others would go the other way—that is, to the right and come out on the east side on the track. The Rainey Addition is on the west side of Texarkana track. The Rainey Addition and the North Side are residence districts and the business district is south. At the west end of the Hotel Ginocchio the street is about on a level with the track. The ground is level to the west end of the hotel, but the next street west of there passes under the track. People who passed down Washington Avenue on foot

going towards the North Side had been crossing the T. & P. there at the north end of Washington Avenue as long as I can remember. Washington Avenue was a regular thoroughfare, and was used more than the other streets in that section of town.

CROSS EXAMINATION:

I got off the Texarkana train at the point marked A on the map which you exhibit to me, somewhere between the track and the Ginocchio Hotel. I could not say how far it was from the west end of the train that I got off. I presume the car east of where I got off was the chair car. I could not tell whether the car west of me was a Pullman. I don't know whether they had a Pullman or two chair cars in that train. The Pullman might have been put on the train at Marshall. I don't know whether there was a Pullman standing coupled to the Shreveport train or not; I don't remember about that. I don't remember just how long the Texarkana train had been there when we started across, but not very long. I remember we waited awhile for it because the train was late. When we got Mrs. Winters seated we started right for home and went on the train and went right through. We did not delay at that place. The train was late. I first got off and next came my daughter Adrian and next Miss May Marcus, and next Mr. Weisman and then Mrs. Wolf and then Louis Kariel. Plaintiff was the third one off, and I believe now Mrs. Wolf came next and then Mr. Weisman and then the Kariel boy. I think Louis Kariel must have gotten off below the Ginocchio Hotel, but I would not be sure of that. I do not know the usual time that No. 2 stays in Marshall. I do not know whether they change engines there. I do not know what they did on the particular night of the injury. I was in the lead of the party when I crossed the train. Washington Avenue going north stops at the railroad. If one were to proceed on Washington Avenue, it would cross the tracks, the telegraph office, the Y, etc. People coming down Washington Avenue going to the North Side the direct route would be to turn a

little to the west to get around. There is a two-story telegraph office and just west of that a one-story roadmaster's office. When you get to the corner of the Ginocchio Hotel you would bear to the northwest and go around those buildings which would land you on the Texarkana track which was a high embankment at that time, I mean there was a definite pathway there all the time where people walked. The ground north of the Ginocchio Hotel and the ground north of the mouth of Washington Avenue was flat, and was of gravel and cinders. A good many people live on the North Side and in the Rainey Addition.

MISS ADRIAN MARCUS, A WITNESS FOR PLAINTIFF, TESTIFIED:

I live at Marshall and was reared there. I remember the circumstance of my sister, the plaintiff in this case, being injured at the depot of the Texas & Pacific Railway in Marshall about two years ago, the date being October 15, 1911. I was down at the depot with the party at the time she was injured. The party composed of my father, May Marcus, Mr. Weisman, Mrs. Wolf, Mr. Kariel and myself had accompanied Mrs. Winters to the Shreveport train. Mrs. Winters had two children with her and was going to her home at Shreveport. Mrs. Winters is my first cousin, and the daughter of Mr. Weisman. After Mrs. Winters was placed on the Shreveport train and we bade her good bye we started to go back home. My father led the way and I followed immediately behind him, and my recollection is that plaintiff was behind me. The train we started to cross was known as No. 2, the train from Marshall to Texarkana. We started to cross the train between the coaches. The doors were wide open so we could go on through. I got off the train before it started. The Ginocchio Hotel is right west of where I got off. I got off near the west side of the little park there. The little park was at the mouth or north end of Washington Avenue. I was on the ground or platform when the train started, and my sister was on the train getting ready to step off; I just did get off and she

was right behind me. The train started with a jerk just as quick as it could, and that threw my sister off on the ground. I helped nurse my sister and I know she was injured by the fall. After she fell my father and I helped her to a chair just outside the Ginocchio Hotel. She sat there and I felt of her ankle and it was broken or sprained very badly, and it was swollen in a little bit. I do not know who helped her from there to the automobile, and she was taken home and some one phoned for Dr. Moore right away. He had a case and was sick himself and he said he could not come and they telephoned for Dr. Rains and he came. After he found he had to set the bones in her leg he got Dr. Littlejohn to give her the anaesthetic, and they then set the limb. Dr. Rains treated her for a number of months, and then she was treated by Dr. Rains and Dr. Bennett. My sister was confined to her bed six weeks or longer. The first plaster cast was wrong and after three weeks Dr. Rains took it off and twisted her foot to one side and put on another one and he left that on three weeks and she was confined to her bed after he took that off, and after she got out she had to use crutches and before that we had her in a chair. Nothing could be put over her foot; she was in pain all the time; she was confined to bed about six weeks without getting up at all, and my mother and I had to set up with her and change her position in bed, and she could not bear for the cover or anything to touch her foot at all. The first cast remained on three weeks and then another one was put on and remained three weeks and then it would be taken off in the day time and we would put it back at night; the doctor split it open and every night we would put it back. The doctor was afraid that in her sleep she might move it too much. At the expiration of six weeks she was up very little; she was so weak; for a little while at a time we would put her in the wheeling chair; she could not stay in there long, she was so weak; she had no strength at all. During the time she was in bed she suffered and kept us up and down; we did not believe in "dope" or giving medicine like that, but we had to give her papine every night; she was

in the most intense pain and it was necessary to give it to her. Mother would phone Dr. Rains to find if there was any way to ease her besides giving her the medicine. That was the only thing to do, give her papine and stop the pain. I could not state definitely how long that character of suffering continued, but it was a long time; I don't remember whether it was as long as she was in bed. I do not remember how long she used the invalid's chair before she used crutches. I know when she took the first few steps was on my birthday, January 24, and then she was put back in the chair. Dr. Rains thought she had gone a little too far; she was put back in bed after that and then started again on crutches, just a repetition of the same thing. Don't remember how long she was kept in bed at that time. If my sister walks fast she limps, and when she is going slow she managed to get along without me noticing it; may be other people notice it. In the morning when she gets up sometimes there is a cramp in her big toe and she can not move it, and sometimes it is in the calf of her leg, and she can not get out of bed for 15 or 20 minutes. She says her foot hurts in the morning, and it is always stiff and she can hardly walk at all. When she walks it gives her pain in it of course. I am her younger sister and have been with her a great deal. The first pair of shoes Dr. Rains had her get were built up on the inside, just sloped the side of the foot; the side was built up; she has to order her shoes all the time, and she can not wear a button shoe; when her foot begins to swell she has to losen her shoe, and her other shoe is a smaller size also. She can not wear a low quartered shoe; her foot turns to one side anyhow. She has to wear a laced high-top shoe. I never heard or saw any notice that the train was about to move; I never heard a thing and I have pretty good ears too. The bell absolutely was not rung; I did not hear it; the whistle was not sounded.

CROSS EXAMINATION:

I did not know at that time whether the Texarkana train backed out of Marshall or not. The train was headed east

and I thought it was going that way. I thought it was going east, the engine was facing east. I did not know whether it came from the west or not. The Texarkana train came in while we were over near the Shreveport train, and it came in after we went over there; I did not knew when it would go out. I was not familiar enough with the trains to know anything about that. I don't know whether the car next to the one we climbed over was a Pullman or a day coach. I know Mr. Gross was on the coach to my left, but I don't know whether it was a Pullman or not. We climbed over the east end of the car we climbed over. I guess the car I was climbing over was west of me, which would be my left hand side. I did not get on the west end of the other car. Both cars were open as well as I remember, and I do not know why we chose one to cross instead of the other. It is natural to pull up with the right arm and I was right-handed. I guess I would go to the right hand side. I could do that on the other car too, I guess.

MISS MAY MARCUS, THE PLAINTIFF, TESTIFIED IN HER OWN BEHALF:

I live at Marshall and have lived there all my life. In October, 1911, I received an injury at the depot of the defendant in Marshall. I went to the depot to see my cousin, Mrs. Winters, off to Shreveport. She had been in Marshall on a visit to my uncle, Mr. M. L. Weisman, and he lived diagonally across the street from us. My father, my sister, Mr. Weisman, Mrs. Wolf, Mr. Kariel and myself composed the party that accompanied Mrs. Winters to the train. I saw her placed on the train that left Marshall for Shreveport; it was after dark when he placed her on the train; after putting her on the train we started home which was down Washington Avenue south; we live on South Washington Avenue. We found a train between us and our home. We attempted to cross over the train between the coaches of the train; I know there was an open place to go through there, but I did not see any door. My sister Adrian

was immediately in front of me and my father had crossed ahead of her. I fell in attempting to get off the coach. I was on a spring ready to make the step from the car to the ground when it started and I fell to the ground. When I was in the act of making the step the train gave a jerk, a decided jar which threw me to the ground. I don't know or remember just how I struck the ground. When they picked me up I was on my knees, I know that. My father pulled me away from the wheels of the car; I fell straight down and very close to the wheels; I fell right down at the end of the steps. My father asked me if I could walk and I placed my foot down and had a numb feeling in it, and I found I could not put my weight on it; I knew something was wrong and I didn't want to; it was very painful. They carried me to a chair placed on the Ginocchio sidewalk, and an automobile was driven up as close as possible and I was led to the automobile by my father and sister; I put the most of my weight on father and sister; I was then carried to my home in the automobile. The Ginocchio Hotel was right close to where I fell; I went from where I fell to the Ginocchio Hotel in a southwesterly direction, and was just a short distance from the sidewalk when I fell. I understand that the Ginocchio was then an open public hotel. When I got home they called the Texas & Pacific Railway Co. physician, Dr. Moore, on the phone, and he did not come and advised us to get Dr. Rains, and they phoned Dr. Rains and he came. Dr. Rains treated me about four months, and then Dr. Bennett commenced treating me, and he continued to treat me for eight or nine months. When Dr. Rains came he got Dr. Littlejohn to give me ether while he fixed my foot. I remained in bed six weeks without ever getting out at all, never put my foot on the floor, and when I would get up every three days for the following three weeks. I would get up and they would try to fix the bed and I would have to rush them to get back to bed. During that three weeks when I would get up every three days for a little while I

would sit in a wheel chair, and after that three weeks I continued to use it and gradually worked up to the crutches. I don't remember the date when I was first able to use crutches. During the time I was confined to bed I certainly did endure suffering; was just miserable all the time. I was not able to sleep without some kind of drug. I not only had intense pain in my ankle, but my body was so stiffened I could not move without the aid of my mother or sister. My foot had to be held in one position and I could not move in bed without help. I had no control over myself at all. I could not sleep without taking drugs. I finally laid the crutches aside some time in February. At that time Dr. Rains was still watching the case. When I first laid my crutches aside Dr. Rains stated to me that he thought he would have to rebreak it, it was so unshapely. The ankle bone seemed to be down on the floor. Some X-Ray pictures were taken of my ankle in order to determine whether or not it would have to be rebroken. I then wore a shoe built up inside to keep the ankle from coming down inside. The X-Ray pictures were taken at the Texas & Pacific Hospital in Marshall. Dr. Moore placed my foot when they were taken. At the time I laid the crutches aside I could not move my foot backwards and forwards. At the time I commenced going to see Dr. Bennett my ankle was very stiff like there had never been a joint there; it was almost entirely stiff; it had a slight movement there, but it was very painful. I was never called upon to use my foot laterally. I noticed in going up and down stairs I could only go one step at a time. In going down the steps now I have to place the left foot first and go one step at a time. That is because there is not enough spring in the ankle. The ankle will not give in making the steps. I limp now when I walk. If I move my ankle the least bit too far or attempt to bring the foot past a certain place, it is very painful, and at other times it is very painful from an ordinary movement. I suffer pains from ordinary movements most every day at some hour during the day; there will be a decided pain in it. It feels like there is a pulling in it. Sometimes a soreness

will develop without any warning; it had a horrible feeling in it. At the time I was injured I was employed as cashier at Joe Weisman's at Marshall. He runs a big mercantile establishment, the largest in this section of the state. I lived with my mother and father. I assisted in the household work when it was necessary. I had been employed as cashier a little over four years at the time I was hurt, and was receiving $55.00 per month salary at the time I was hurt. After the injury they kept the position open for me until they gave me a chance to try myself out to see if I could constantly stand on my feet, and they finally gave it up about July, 1912; they gave up the idea of my being able to take that position back again. The next work I did after I was hurt was in March of this year. The work I have been engaged in since I was injured has been assistant stenographer and a little bookkeeping; being on my feet in this position is not demanded or required of me. While at Weisman's I had the privilege of getting my own supplies at the store, dress goods, millinery and shoes at cost and that save a good deal. My right foot and ankle are much larger than the left foot and ankle at this time. My right foot is smaller in the morning after it has been in a horizontal position all night. The swelling will go down during the night, but next evening it is again in the condition it was during the preceding evening. It is always larger at night than in the morning. It is never as small as the other foot even in the morning after the swelling has subsided to some extent during the night. I am not able to wear the same kind of shoes as other young ladies of my age and standing. I am forced to wear laced shoes. Of course the styles of shoes change. The style of shoes I have to wear are not the style young ladies of my class wear at this time. My shoes are ordered with a low flat heel, and the left one is one-half size smaller than the right one. I am not sure whether it is just one-half size or one full size, but, at any rate, the left one has to be smaller than the right. I am not able to get around and engage in the diversions and pleasures indulged in by young ladies of my class. I am not able

to walk or stand on my feet for more than thirty minutes at a time.

CROSS EXAMINATION:

The shoe I now wear is not built up, but I have to have shoes made for me. I am a stenographer now and my salary is $60.00 per month. I have had my present position since the 9th of May. Flat heeled shoes have been quite fashionable for the past six months, but the members of my family have not adopted that style. I know it was especially objectionable to me to have to wear them. I would not have worn that kind of shoe but for my injury and inability to wear any other kind. I have not noticed any girls wearing high laced shoes during the summer. I got off or attempted to get across the train about the corner of the little park which is the width of the sidewalk east from the Ginocchio Hotel, which would be 10 or 12 feet. I know after I was hurt we went diagonally across to the sidewalk and they placed me in a chair. Everything was knocked out of my head when I fell, I am sure of that, and I don't remember just how the situation was there. I do not know whether the car back of me, west of me, was a sleeper or day coach. There was a car west of where I attempted to cross the train. I would not have climbed over there if it had been the end of the train.

RE-DIRECT EXAMINATION:

I don't know whether there was more than one car west of where I attempted to cross or not. After I was hurt I had to take a business course in order to be trained in the work of a stenographer.

MRS. SAM WOLF TESTIFIED FOR THE PLAINTIFF:

I live in Marshall, Texas, and am a daughter of Mr. M. L. Weisman, and a sister of Mrs. Winters of Shreveport, La. I remember the circumstance of Miss May Marcus being injured at the depot of the Texas & Pacific Railway at Marshall about two years ago. Prior to that time my sister,

Mrs. Winters, had been in Marshall on a visit to me, and Mr. Marcus and his family lived just across Washington Avenue from us. On the day the plaintiff was injured Miss Marcus went to the depot to see Mrs. Winters off on the Texas & Pacific train for Shreveport, and I was at the depot for the same purpose. In the party at the depot were Miss May Marcus, Mr. Marcus, Miss Adrian Marcus, my father, Louis Kariel and myself. Mrs. Winters had two children with her. After Mrs. Winters had been placed on the train and we bade her good bye we started to return to our homes. Our home was south of the depot on Washington Avenue. When we started home there was a train between where we were and Washington Avnue. When we got to this train we went through the vestibule which was open on both the north and south sides. Miss May Marcus was immediately in front of me in crossing the train. Before we stepped on the coach to go over I did not see anything to indicate that the train was about to start. The moving of the train was the first notice I had of an intention to move. The train made a sudden jerk or start. I was back of Miss May at the time the train gave the jerk, and she was on her way down the steps of the coach. The sudden moving of the train threw Miss May Marcus to the ground from the steps of the coach. I got off the train after Miss May fell. I think my father and Louis Kariel were behind me; that is my recollection. Before the train started with the jerk no bell was sounded or whistle blown, and no outcry or signal was given of an intention to start the train. I saw Miss May fall right in front of me, and knew she was injured but did not know how badly. She was taken home and a physician called. She got home before I did. I continued to live in her immediate neighborhood. As nearly as I remember, the plaintiff was confined to her bed about six weeks. After that time she was placed in a rolling chair. To the best of my recollection, she used the rolling chair six weeks or two months, and after that she got about on crutches, but I don't remember how long she was on crutches. I could not estimate the length of time. During the

time she was in bed I saw her very nearly every day and several times a day at times. She was very nervous while in bed. She suffered greatly. Of course the nervousness and great suffring was more severe right at first, but all the time she was in bed she suffered greatly. After she got up and on crutches the nervousness and suffering continued, but in a lesser degree. I think it still continues in a measure. Her ankles are not the same size now; the right ankle is larger than the left. She is not able to walk without an impediment in her gait. Drugs were given her to alleviate her sufferings. Her mother often had to phone in the middle of the night to get medicine to ease her pain. She also took medicine in the day time.

CROSS EXAMINATION:

I said no bell was sounded nor whistle blown. I was listening for the bell or whistle, because we never would have attempted to have crossed the train if a signal had been given. I listened for the bell before going on the train and after I started on. The whistle was not blown nor bell rung, for there were seven in the party and some of us would have heard it. I knew that particular train moved west first, and then went towards Texarkana. We did not expect the train to move at that special time, but we listened. I did not know it was about time for the train to move out. I don't know how long it had been there. I think Mrs. Winters got in the sleeper of the Shreveport train. The Shreveport train stands there and waits for the other train from the west to come in before it pulls out. We went to the Shreveport train before the train from the west came in. I do not remember whether the sleeper that comes from the west goes on the Shreveport train. None of our party went inside the Shreveport train with Mrs. Winters I don't remember whether Mrs. Winters got on the Shreveport train as soon as we got over there or whether she waited awhile before getting on. I think where plaintiff fell was between the end of the little park and the Ginocchio Hotel. I got off the train after it started without falling.

My father got off after I did. The train was in motion when I got off. The train did not stop after it started. Miss May fell, and then I got off after the train was in motion as did also my father and Kariel. Louis Kariel was about 16 or 17 years of age. The engine was some distance east of where we went across the train.

M. L. WEISMAN TESTIFIED FOR PLAINTIFF:

I live at Marshall, Texas, and that has been the place of my residence for 28 years. I know Mr. A. Marcus; he is my brother-in-law. Mrs. Wolf is my daughter as is also Mrs. Winters of Shreveport, and the plaintiff and her sister are my nieces. I remember the circumstance of the plaintiff being injured at the Texas & Pacific depot at Marshall about two years ago. I was there that evening. The depot at that time was on the south side of the main line of the Texas & Pacific Railway, and the telegraph office, dispatchers office and railroad officials offices were on the north side of the New Orleans main line of the defendant and east of the Texarkana main line, in other words, in what was known at the time as the Y. The depot was east of the mouth of north end of Washington Avenue, the Ginocchio Hotel west of Washington Avenue, and the Elgin Hotel faced on the railroad track. There was a little flower garden at the mouth or north end of Washington Avenue. I lived south of there on Washington Avenue and so did Mr. Marcus. For the purposes of identification, we will see that there were three parts of Marshall at that time, the main town or South Marshall, the Rainey Addition and the North Side. The business section of the town and the main part of the town was south of the defendant's depot and tracks. The rough sketch you exhibit to me shows the old passenger depot, the Elgin Hotel, the Ginocchio Hotel, the little park and the train on the main line called No. 2, and shows the Shreveport train further north. The line of railroad running north to Texarkana is further out than the plat shows. The Rainey Addition is on the west side of the Texarkana line, and what we call the North Side is on the east side of

the Texarkana line, and on the north side of the line to Shreveport. At the time of the injury out of which this suit grows Marshall was a town of about 13,000 inhabitants. The Rainey Addition and the part of Marshall on the west side of the Texarkana line constituted quite a neighborhood, and the North Side was larger than the Rainey Addition. It has been known as the North Side for a great many years and is pretty thickly populated. In passing from the main part of Marshall, and especially from the business section of town, and going to the Rainey Addition or North Side on foot, they usually go down Washington and cross the tracks near the depot. Washington Avenue is the main street in that part of town. A great many people came down and walked across there, and a good many people came down and went across to the new shops. There are steps on the North Side down east of the Elgin Hotel, and people would come down Washington Avenue and go across east to the shops. Persons going to the Rainey Addition would not go east there, but would go back the other way. I have seen considerable travel across there, and has been for a long time, a number of years. Our party placed Mrs. Winters and her children on the Shreveport train and then started to their homes which were south of there on Washington Avenue, which was a paved street with sidewalks. When we started home we found No. 2 on the track between us and the depot and between us and Washington Avenue. It was dark. Our first intention was to pass around the train, but we found an opening between the cars and started through that way; the vestibules between the cars were open and we concluded to cross over there. I presume the east end of train No. 2 was down below the Elgin Hotel, and the west end was down west of the Ginocchio Hotel. My daughter, Mrs. Wolf was immediately in front of me when I went on the train. The train was standing when I started to cross, and it was moving when I got off. The train moved suddenly, and that caused me to kind of fall forward towards the door. I was in a measure jerked forward by the movement of the train. I

did not look and could not state exactly where plaintiff was at that time. I did not hear the bell nor whistle sounded just before the train started and there was no cry of all aboard or anything to indicate that the train was going to move. Louis Kariel was behind me. After I alighted from the train I ascertained that plaintiff had been injured. When I got off the moving train I returned to where she was and ascertained that she was down and could not get up. She was afterwards carried home and a physician called. They rode in an auto to their home and we walked, and I think the physician had been called when we got there. I think she remained confined to her bed about six weeks before she was able to stand up at all. After she got out of bed she got around in a chair for awhile and afterwards she used crutches. It was some time after she got on crutches before she was able to discontinue the use of them, but I don't remember the exact time. I do not know so much about her sufferings, but I know I would not be in the room more than 10 minutes before I would have to retire to permit them to move her in bed, and she complained of suffering. That condition continued all the time she was in bed, and for some time after she got out of bed she complained of suffering. Her right ankle is larger than the left at this time.

CROSS EXAMINATION:

Washington Avenue does not cross the track of the defendant. At the end of Washington Avenue is a park with flowers in it and it is enclosed, and this is the condition that obtained at the time of the injury to plaintiff. The park extends to within a few feet of the sidewalk and gallery of the Ginocchio Hotel, and on the east the park extends up close to the depot property. The avenue stops near the railroad and no vehicles cross the railroad at that point. North of that were the offices of the superintendent and road master in the Y, but not in the middle of the Y. The Texarkana track runs northeast out of Marshall, and the New Orleans track runs east and west along there, and then there is a

track that goes from the New Orleans track and connected with the Texarkana track and forms the Y. The people that walk out to the North Side walk on different places on the track, and the people that go to the Rainey Addition walk along different places along the track. There is a street west of there that goes under the track and that is the street leading to the Rainey Addition. There was no rock bound pathway that went from Washington Avenue to any of those places; there was no beaten pathway; they just used any part of it. When we went to the Shreveport train the track between there and the depot was clear. No. 2 is the train that goes to Texarkana, and it had not yet arrived when we went over to the Shreveport train. No. 2 has been the Texarkana train for a number of years. I knew that the Shreveport train would wait for No. 2, and that when No. 2 came in there would be passengers for the Shreveport train. The Shreevport train was made up at Marshall, and it was my understanding that the train from the west, No. 2, would connect with the Shreveport train at Marshall, and that there would be passengers from the west to take the Shreveport train. At the time we went to the Shreveport train I don't think No. 2 was approaching—that is, I don't think it was in sight. After we got over to the Shreveport train No. 2 came in and took the main line at Marshall, and its purpose was to come in and unload passengers, express and baggage and then back west. That was the usual practice. The depot, express office and baggage room are all on the south side of the main line and on the opposite side of the train from where we were. After No. 2 got through its business there at the depot, it would move backwards. When we first started home my idea was to go around the train, and I found the opening there and crossed over the train. I knew when that train got through with its business, it would back away from there. We started around the train because we did not expect to have any other place to go. I did not expect for the space between the cars to be open and did not look for it to be open. I had an idea it would be closed on the north side and therefore we would have to go around,

and when I found it open I found something unexpected to me and I took advantage of the situation and went through there. There was no employe of the company there at the steps. I don't know that I was surprised to find the opening; we found it and took advantage of it. I did not hear the bell ringing from that train at all. I think possibly the bell of No. 2 was ringing when it came in. I had not given the matter of the bell ringing and the whistle blowing any thought until that happened, until the next day. I thought about the matter the next day and asked the balance of them if they heard the bell ringing or any notice that the train would start, and none of them remembered hearing it. If no accident had occurred the matter of the bell and whistle would not have occurred to me the next day. After the accident and the next day when I got to thinking about it the whole matter came to my mind. The night of the accident I never paid any attention to whether the bell rung or not. at the time we started across I never paid any attention to whether the bell was ringing or whether anybody holloaed "all aboard" or anything of the kind. I did not stop the party and tell them to wait and see if they were going to start the train, but just supposed they would not move it. We crossed through the vestibule between two cars, and did not go to the end of the train to cross. We took the east car vestibule, and crossed on the west end of the car. Mr. Marcus went through first, Miss Adrian Marcus next and then plaintiff, then Mrs. Wolf and then myself and then Mr. Kariel, and we all went through the same vestibule. We did not stop on the north side, but passed right on through. There was no stop made there any more than we had the opening to go through. The engine of the train was about the Elgin Hotel as near as I remember. I think she fell right by the little park. The distance from the Ginocchio to the Elgin Hotel is two streets and a block; that would be about the distance from the engine to where plaintiff fell; about 240 feet perhaps across the block, and then the streets are 60 or 80 feet wide.

RE-DIRECT EXAMINATION:

The Ginocchio Hotel at that time was a public hotel open for business, and I believe the Elgin was also. From the end of Washington Avenue on across the tracks there it was filled with gravel. A good many people coming from the Rainey Addition would walk up Washington Avenue and cross the track there near the depot and the Ginocchio Hotel. In leaving Washington Avenue where one would cross the track would be largely a matter of choice, and it would be a matter of choice as to the route after crossing the tracks. The steps I mentioned are on the east side of the Elgin Hotel and on the railroad property. They are in the next block east of Washington Avenue. The steps are near the freight house and a little west of it, and the freight office is a block and a half or two blocks from the depot.

RAY CLARK TESTIFIED FOR PLAINTIFF:

I live at Marshall and have lived there 12 years. I lived in what is known as the North Side in Marshall for about four years. I work for the Marshall Car Wheel and Foundry Co. I now live on the south side of the defendant's track. I knew the situation at the defendant's depot at the time plaintiff was injured. I was not at the station the evening she was hurt. During the time I lived on the North Side and since then I have had occasion to be about the defendant's depot at the times when No. 2 and the Shreveport train were there. In going from my home to the depot of defendant, I would there take Washington Avenue to the business part of town, that being the main thoroughfare, and in going home I would go down Washington Avenue to the track of the defendant and there cross the tracks or walk down through the yards. I would usually go up the track a hundred yards from the place where Washington Avenue came to the defendant's track and go down the steps on the north side of the track. I would sometimes go east on one side of the south track and sometimes on the other. A great many people pass along there. When No.

2 would arrive at the station it would have passengers for the Shreveport train, and the vestibule on the north side of No. 2 would be left open so the passengers could leave No. 2 and go over and embark on the Shreveport train, and people south of the track would also pass over the steps of No. 2 to get to the Shreveport train and returning from the Shreveport train to the depot. I have seen quite a number of people cross over train No. 2 in that way, that condition has existed for a number of years or had at the time of the injury to plaintiff. I especially knew of that custom during my four years residence on the North Side. When No. 2 was at the depot in Marshall, the east end of it would be about the Elgin Hotel, and the west end of the train would be considerably west of the Ginocchio Hotel. The west end of the train would be east of the trestle where the first street west of Washington Avenue passes under the defendant's track.

CROSS EXAMINATION:

The steps that lead up to the track east of the Elgin Hotel constitute about the only passway the people working at the defendant's shops have—that is, those that live on the South Side. If No. 2 was standing at the depot, one coming to those steps would be east of where the engine of No. 2 would stand. A person would walk on the north side of the train to get to climb over it. I can tell you my reason for that; I don't know whether everybody did it or not. It was sloppy along there in bad weather. The natural way would be to cross over towards the Elgin Hotel and go on the south side of the train—that is, under normal conditions. When one got west of the road master's office you would be practically even with the west end of No. 2. I have seen women go over No. 2 there and I took my wife over it. I don't know whether I have seen others cross the train there or not; I never paid any attention to it; I have seen them go back and forth from that passenger train and over it to the plug. The plug is there when No. 6 is there. I could not tell you whether all the people I saw cross there were pas-

sengers or not. I have seen them cross No. 2 to get to the Shreveport train. The conductor belongs on the south side of No. 2, that is his place. The people I saw going through there crossed to the north side. I have not been around the depot much in two and a half or three years; I have been living in another part of town and have not been there like I was before I moved.

RE-DIRECT EXAMINATION:

I have seen people cross there going to and returning from the Shreveport train. There used to be a saloon up east of where the engine of No. 2 would stand, and was a pretty rough place in there, and I did not care to bring my wife around that way. I took advantage of the train at that place being open and went through. The place east of the engine was greasy and dirty, and by going across the train I avoided that and got away from the rough element.

RE-CROSS EXAMINATION:

I have been at the depot when the train from Shreveport came in, and have seen people wait until the other train pulled out and cross over towards the depot and hotel.

R. K. TURNER, A WITNESS FOR THE PLAINTIFF, TESTIFIED:

I live at Marshall, and have lived there all my life. I know Mr. A. Marcus and his family. I live on the same street they live on a block below them. I remember the circumstance of the plaintiff being injured at the depot of defendant about two years ago. The depot at that time was on the south side of the track and was between Washington Avenue and Bolivar Street. The Ginocchio Hotel is on the west side of Washington Avenue and across the street from the depot. I was justice of the peace of Precinct No. 3 at the time plaintiff was injured, and previous to that I had been a Deputy Sheriff. I knew the Shreveport train that would leave Marshall late in the evening about the time the plaintiff was hurt, and also knew the

train known as No. 2 which arrived at Marshall just before the departure of the Shreveport train. When No. 2 would come into the station at Marshall, there was a habit and custom of people passing across to the Shreveport train and back from the Shreveport train to the depot or hotels. They would pass between the cars and over the platform of No. 2, or they might go down two or three hundred feet opposite the Elgin Hotel and pass around the train or go around the west end of the train down near the Ginocchio Hotel, about 200 feet. I judge the way they would depend on the length of the train, whether a long or a short train. No. 2 had what is known as vestibule coaches, and they could be entirely closed so there would be no place open between the coaches. Generally the vestibule between the coach and chair car was open while No. 2 was standing there—that is, between the two day coaches. I would see a good many people cross from one side of No. 2 to the other over the platform. That condition had existed as far back as I can remember, a good long time.

CROSS EXAMINATION:

Some of the people crossing back over No. 2, going back and forth, would be railroad employes putting ice and water in the cars of the Shreveport train. Generally the porter stands where the vestibule is open on the south side of No. 2. I don't know that I ever saw it happen that he was not right there. The people that went over the train were not always people that passed right by him and went over to the north side. I have seen them pass next to the baggage car. The vestibules were not generally closed. I worked at the station some time back and the vestibule between the baggage car and the first coach was not closed. That was some years before the injury to the plaintiff. I don't know whether that condition still exists or not for I have not had occasion to notice it. I worked there for the company in 1904 and 1905. I have seen a good many people go around the train and not cross over it. Very often people would cross the No. 2 train to see who was on the Shreve-

port train, and there would be passengers going backwards and forwards from one train to the other. I have seen Miss Mary Kives go from No. 52, or the Shreveport train and cross No. 2 in going to town. I have carried her across there myself, and have seen her cross No. 2 over to No. 52. She is my sister-in-law. I did not in crossing have information that No. 2 would stand there long enough for me to get across. I would just take chances on that, and would make no inquiries. I do not remember now whether the porter would be there when I would go over. There would generally be a step box there for the passengers to get on and off the train and we would go right on through.

RE-DIRECT EXAMINATION:

I would carry my sister across and put her on the Shreveport train, and where I would cross in coming back would depend on the length of No. 2 and whether I was in a hurry or had plenty of time. I presume persons who went to the train to see relatives and friends off on the Shreveport train would cross over No. 2.

EARLY AKIN, A WITNESS FOR THE PLAINTIFF, TESTIFIED:

I live at Marshall and am on the police force there; have held that position about ten years. I remember the circumstance of the plaintiff being injured at the depot of the defendant about two years ago. The depot at that time was on the south side of the railroad and the principal part of Marshall was on the south side of the railroad. There was part of Marshall known as the Rainey Addition northwest of the depot and a part of Marshall known as the North Side northeast of the depot. I remember that at the time plaintiff was injured and for some time before there was a train made up at Marshall for Shreveport, and that there was a train came in from the west known as No. 2 that later left and went to Texarkana. Prior to the time plaintiff was injured I had occasion to be around the depot when those two trains were there quite frequently. When No. 2 would

be standing there with the engine down about the Elgin Hotel, persons on the south side of that train who wanted to go to the north side of the train, and persons who wanted to go from the north to the south side of No. 2 would sometimes go around one or the other end of the train and sometimes they would cross over the train between the coaches. They most always crossed over the first coach, the second class coach just below the Ginocchio Hotel. They would cross at the vestibule opening between the two coaches. While the train would stand there they would keep the vestibule open. I have seen people going to the Shreveport train cross through that vestibule opening from the south to the north side of No. 2, and I have seen persons who had accompanied passengers to the Shreveport train come back through there. I have seen a good many do that. That condition existed prior to the injury to plaintiff ever since I have been on the force, and I have been working around there eight or ten years. The vestibule doors can be closed or opened, and when they are closed there is no space left between the cars through which one could pass.

CROSS EXAMINATION:

If the vestibule doors were closed, of course people could not get on the trains; there is no way to get in the trains except through the vestibule doors. People that wish to take passage on No. 2 ought to have the right to enter the cars all the time the train is standing there, and ought to have the right to get off all the time. It is the custom for the door on the on the north side of No. 2 to be open and a man standing there announcing "this side for the Shreveport train." More people cross over No. 2 while it is standing there than go around it. Some people stand there until No. 2 pulls out and some of them cross over. Some people that came in there crossed over and some got on No. 5, which goes west. I have helped several people across No. 2, and I have helped them off and on, and I have helped them across there at a place where there was not a porter or anybody else to look after them. It is true that there is never a ves-

tibule open on No. 5 except where the porter stands, but have helped them over when the porter was not there. This would be seldom, not very often. I have seen people that came in on No. 52 cross there, and I have seen them cross over No. 2 when there was no porter there. I have seen No. 2 standing there and nobody there to help people over. I presume they do not expect to help them over or thy would stay there. After passengers would get off No. 2 and go to the Shreveport train, they would most always leave the north door of the vestibule on No. 2 open.

B. A. CARGILL, A WITNESS FOR PLAINTIFF, TESTIFIED:

I lived in Marshall I think about ten years, and was constable there about four years. After that I was Sheriff of the county. I remember the circumstance of plaintiff getting hurt at defendant's depot in Marshall about two years ago, but know nothing of the facts. As an officer I very often had occasion to be at the defendant's depot when passenger trains would come in and go out. There was a train left Marshall late in the evening for Shreveport known as No. 52, and there was a train that came into Marshall from the west going to Texarkana known as No. 2. The station was on the south side of the track. People on the depot side of the track in going across to the Shreveport train when No. 2 was standing at the depot, would have to cross No. 2 over the platform, and this would be likewise true when they were returning from the Shreveport train to the depot or the hotels, or when they were returning to town after seeing friends off on the Shreveport train. If they wanted to get back on the south side before No. 2 left, they would cross over No. 2. The vestibules were left open while No. 2 was standing there. That condition existed as long as the old depot was there during the time I was an officer. A good many people would cross over No. 2 while it was standing there. Marshall is a town of about 13,000 people, and there was a good deal of travel on both those trains.

CROSS EXAMINATION:

The Shreveport train was there and made up there and generally ready for people to board it before No. 2 came in from the west. I do not know how long the Shreveport train stood there, but it was made up there. I have seen many people go there and get on it before the train came from the west. Possibly people could go to the Shreveport train and see friends off and get back on the south side of the track before No. 2 arrived. The Shreveport train always waited until No. 2 backed out before it started. Passengers would have time to get on the Shreveport train after No. 2 had left, and they could have waited until No. 2 backed out. I do not know that it is just the people that get nervous about the Shreveport train leaving that cross there. The Shreveport train and No. 2 generally pulled out near the same time, but it is a fact that the Shreveport train always left last; if it did not, it was an unusual circumstance. I could not name any particular person I have seen cross No. 2 to see friends off on the Shreveport train. I have been there and noticed people cross and been there on other occasions when I did not see any cross, and sometimes the No. 2 train would come in late and they would have to cross over it. There was always a porter there when No. 2 came in with a box for people to step on in going on and alighting from the train. I do not remember seeing a train come in and unload the passengers when the porter was not there with the step box. Generally the passengers would get off and then he would let passengers on. I have crossed over No. 2 many times both ways. I was not expecting the engineer and conductor to look out for me; being an officer I was rather looking out for the whole bunch. I took care of myself. I do not know whether they have an ordinance in Texarkana which forbids one who does not intend to be a passenger getting on a train. I have seen people cross over No. 2 that I knew did not intend to become passengers. I have seen people cross over there and come back to the depot after both the Shreveport train and No. 2 had left.

JESSE JAMES TESTIFIED FOR PLAINTIFF:

I live at Marshall and have been there about 20 years. I have been constable and a policeman at Marshall. I was last on the police force about a year and seven months ago. I remember the circumstance of plaintiff being injured at the passenger depot. I heard of it at the time. At that time the depot was on the south side of the tracks, and train No. 52 left Marshall for Shreveport late in the evening, and there was a train that came in from the west and later left for Texarkana known as No. 2. When No. 2 was at the depot and people on the south side of the tracks wished to go to the Shreveport train would sometimes cross No. 2 between the coaches through where the vestibule was open. Persons who had gone to the Shrevport train to see friends off on that train would sometimes come back to the south side of the tracks by going through between the coaches of No. 2 and sometimes they would go around the end of No. 2; I did not pay much attention to that. There were a good many people passing back and forth between the coaches. I could not say exactly how long that condition had existed, but for a good long time.

CROSS EXAMINATION:

Sometimes people passing through the vestibules of No. 2 would pass through when there was a porter and sometimes there would be no porter there. When No. 2 would come in they would have a man get out there with a step and put it down for passengers to step on in getting on the train.Sometimes the train would stand there awhile and the porter would leave and some man in a hurry thinking he was late would run to the train and get on. As long as they made it a business putting passengers on and off they had that step there. As long as they were there the step was usually there, and when they got ready to go out they would take it up. People going across No. 2 to get to 52 would step on the box, and I have seen them cross there after the step was taken up. My observation was that the step was usually put up as as soon as they got through letting pas-

sengers on and off. I never paid much attention as to whether the porter would then go somewhere else. When No. 2 came in the vestibule on the north side was left open so passengers wishing to take the Shreveport train could cross over. They sometimes made a practice of having a man stand there to tell the passengers wishing to go to Shreveport to get off on that side. As far as I know, it was the usual custom to have a man standing there to see the passengers off that wanted to take No. 52, and I think they would have a step for them to get off on on that side. I have seen them get off without the step. As a usual thing they would put that step up after the people got on and off; that was the general custom. I have seen some people go through No. 2 and off on the other side without a step being there. I have seen people come from the Shreveport train across No. 2 with no step there and no one there to assist them off. Some people would go to the Shreveport train with friends and see them off and then cross over No. 2 through the vestibule. It is a general rule when a passenger train comes into Marshall to have some one assist the people off that want to get off. That is for the purpose of preventing people from getting hurt and they have the box there to permit one to make two steps instead of one long step. I have seen a good many people go around No. 2, and some of them would wait until No. 2 backed out of the way before crossing. I have seen the Shreveoprt train pull out before No. 2, but that would be exceptional. No. 52 was made up at Marshall and they held that train there until No. 2 got in so that passengers wishing to go that way could take passage and make the connection. I have seen passengers come from the depot and get on No. 52 after No. 2 had pulled out.

RE-DIRECT EXAMINATION:

The two trains usually leave about the same time, but they don't always do so. I have seen the vestibule door on the north side of No. 2 left open after the passengers had

got on and off the two trains. I have crossed there several times myself under such circumstances.

W. H. WHITSETT TESTIFIED FOR PLAINTIFF:

Live in Marshall and have lived there 25 years. Have been on the police force and have been a deputy sheriff. Was a deputy sheriff two years. I heard of the circumstance of plaintiff being injured at the depot of defendant in Marshall about October, 1911. At that time the passenger depot was on the south side of the tracks of the defendant. Train 52 at that time left Marshall late in the evening for Shreveport and stood north of the main track north of the depot and train No. 2 came in on the track between No. 52 and the depot. Persons on the south side of train No. 2 who wanted for any purpose to go to train No. 52 would usually go through on the steps of No. 2 if the doors were open; they would go through between the coaches. That condition has existed or had up to the time of the injury to plaintiff ever since I have been in Marshall. Persons on the north side of No. 2 who wanted to go to the south part of Marshall would also cross over the platform of No. 2 between the coaches. A great many people passed from the north to the south part of Marshall every day and every night. There are three divisions of Marshall—the South Side or that part south of the railroad in which is situated the business part of town as well as quite a number of residences, and then north of the railroad is the Rainey Addition or neighborhood, and also what is known as the North Side of Marshall. The principal thoroughfare and passway for pedestrians from the north side of town to the south side is down Washington Avenue and Bolivar Street and Washington Avenue is the most traveled. People going from the South Side to the North Side and the Rainey Addition, when they got to the end of Washington Avenue at the railroad of defendant, would walk across the railroad tracks. That condition of affairs had existed for a number of years prior to the injury to plaintiff.

CROSS EXAMINATION:

When I would notice people passing over No. 2 to the Shreveport train I would be sometimes on one side of the train and sometimes on the other. When the people would pass over No. 2 sometimes the porter would be there and sometimes he would be handling the baggage or helping with the baggage. Sometimes there would be a step box at the steps and at other times there would not, and I have helped ladies across there when there would be no step there. I did not consider it dangerous to cross the train with ladies when it was standing still. I did not have any assurance that the train was not going to start, but it did not start often when people were going across there. The conductor was there to give orders. I have heard the conductor tell people to go over No. 2. I have heard Sam Nicholson and Frank Jordan do that. I do not know of what train Jordan was conductor. I know Nicholson was not a conductor on No. 2. I have also heard Powell do that, and I don't know whether he was conductor on No. 2. I have seen Nicholson, Jordan and Powell on the south side of No. 2 helping people over, and I have seen them on the north side. I believe they ran on the Shreveport trains. I have seen other conductors do that, but I don't remember their names. I do not think there was any danger of the train starting while the conductor was there, and I believe it was perfectly safe for people to cross when he was there. When I was helping people over there, I presume I was taking chances on the train not starting. I did not notify the conductor that I was going over. I would not look to see where the conductor was. I have seen people cross over No. 2 after the step had been taken up. I have helped ladies across after the stool had been taken up. The fact that the stool is taken up does not always mean the train is ready to go. It means that the porter wants to get his work done. I don't know that it means that all the passengers have gotten off and on. I have seen the porter take the stool up before everybody had gotten on. I presume the porter wanted to get his

work done quickly so he would be ready to go and took the stool up so he could go forward and finish his work. I have seen the stool taken up before all the passengers came to the steps to get on. I presume the porter knew whether people wanted to become passengers on No. 2 or wanted to cross over to the Shreveport train. Lots of times it looked to me like they did not care. The porters worked for the railroad company and ought to have done what they were hired to do. The railroad has never objected to people crossing over No. 2 to get to the Shreveport train. The porter ought to ask the passengers or people crossing there which train they desired to take. That is what he is there for. I presume the persons getting on No. 2 would tell the porter where they wanted to go. The porter ought to stay there and wait on the passengers. I should think he would have to ascertain whether they are to become passengers or merely crossing over the train. Some of the porters are negligent and instead of staying there and attending to their duties they run away to the lunch counter and such places as that. I volunteered the statement that the porter was sometimes negligent, and I said this because if he was not negligent he would be there attending to his duties. He would be negligent in that he failed to help people on and off the train. The porter helped attend to the baggage. It was the duty of the porter to help people on if they wanted to cross over No. 2. I don't say I know that to be the duty of the porter; I just suppose it was. I don't think a train porter has any business objecting to anything. I don't think the porter ought to object to any man getting on No. 2 who is not to be a passenger on that train. I think he ought to let anybody get on that wants to, and let the conductor put them off if they are not properly on the train. The porter generally asks the people where they are going; sometimes he does not.

N. A. GREEN TESTIFIED FOR THE PLAINTIFF:

I have lived in Marshall about 25 years and am now Chief of Police, and have been two years the first of last July, and

for several years prior to that I was an express messenger out of Marshall on the N. O. & P. Division. I think I quit that position about 1904. I remember the circumstance of the plaintiff being hurt at he depot, and that was after I was appointed Chief of Police. The main part of Marshall is on the south side of the defendant's railroad, and the Rainey Addition and what is commonly called the North Side is north of the railroad. Rainey Addition and the North Side are residence districts. At the time plaintiff was injured, and from the time I was appointed Chief of Police there was a train left Marshall for Shreveport in the evening known as No. 52, and I know that train had been running out of there for at least ten years. There was also a train that ran from Dallas to Texarkana that got into Marshall while No. 52 was there, and this latter train was known as No. 2. No. 2 would stand on the south track next to the depot and No. 52 on a track immediately north of where No. 2 stood. Persons on the south side of No. 2 who wished to go to No. 52 for the purpose of taking passage or seeing friends off on No. 52 could go around the end of No. 2, but most of the time they would go over No. 2 on the steps between the coaches, and in coming back from No. 52 to the depot on to town south of No. 2, they would generally cross No. 2 in the same manner. There were nearly always people crossing over No. 2 in that manner, and quite a number of people crossed. To my knowledge this same custom and condition had existed as far back as 1900, and up to the time the depot was moved.

CROSS EXAMINATION:

Train No. 52 made up at Marshall and did not come in from the west, and it waited at Marshall for No. 2 to arrive so that passengers could make connection and the express, mail and baggage could be transferred. Usually there would be a man stand on the north side of No. 2 to announce to people wishing to take No. 52 to get off on that side. The conductor or porter would stand there and tell them to get off on that side for the Louisiana train. I think that was a

custom that obtained to such an extent that it occurred nearly every time the train came in. There would be a stool on the north side for people to step down on. There would also be a man on the south side of No. 2 with a stool to help people off No. 2 who wished to stop at Marshall. They would have the stools and men on both sides of the train until they got the passengers unloaded and loaded. That was the general custom, and after passengers were loaded and unloaded, I presume they would put the stools up and get ready to leave town. Passengers who wished to take passage on No. 2 got on on the south and not the north side of the train. The rule was to let the passengers get off before other passengers got on. There would be a man on the south side of No. 2 to assist passengers off and on. All the man on the north side would have to do would be to assist people to alight from No. 2 who wished to take No. 52. I was express messenger there five years. While running as messenger I did not notice much how the passengers and people were handled, for I would generally be busy with the express matter. I noticed the stools being put down, but did not notice how long they left them down. The purpose of the stool is to shorten the step to the ground, and that was beneficial to passengers and especially to ladies. They always carried those stools on the trains. Every time they got ready to take passengers on or let them off they used the stools; that was such a common custom that they rarely failed in it. I never noticed whether people would cross No. 2 coming from 52 when no stool was there. No. 52 and No. 2 left Marshall about the same time. It was the rule for 52 to wait for No. 2 to get the passengers as well as express, baggage and mail. The mail from No. 2 had to be put on No. 52 before it left. I believe No. 2 always left a little before No. 52. They usually got loaded about the same time, but as a general thing No. 2 pulled out first. It looks like some people are always late, but most of those who wished to take No. 52 would be down there before No. 2 came in. People coming into Marshall on No. 2 that lived there would usually get off first and stand around there to

see who got off. I have myself passed through No. 2 to get to 52. Sometimes there would be steps on the north side for me to step on and sometimes not. When the step was not there No. 2 was usually ready to go. The absence of the step was a kind of indication that No. 2 was ready to go.

RE-DIRECT EXAMINATION:

I could not say that there was any rule as to whether No. 52 or No. 2 should leave first. The leaving time must have been pretty close together. I have seen 52 leave first, but usually No. 2 got out a little ahead of No. 52. The one that got loaded first went out first, I think, and that was usually No. 2.

R. A. BURNETT TESTIFIED FOR PLAINTIFF:

I live in Marshall and have lived there about 25 years. During ten years of that time I have been deputy sheriff and policeman. The main part of Marshall is on the south side of the defendant's railroad. Two years ago when plaintiff was hurt there was a train known as No. 52 that made up at Marshall and went out to Shreveport late in the evening, and there was a train known as No. 2 from the west that left Marshall for Texarkana something near the same time. I remember the circumstance of the plaintiff being hurt. When No. 2 was in Marshall, it was between the depot and No. 52. People on the south side of No. 2 who wanted to go to No. 52, and people on the north side of No. 2 that wanted to go back on the south side of that train, if they did not wait until No. 2 pulled out, would go over No. 2 between the coaches. I have seen a good many people go through there and I have crossed No. 2 that way myself, and I have also seen people wait for No. 2 to pull out. That condition and custom had existed for several years prior to the time plaintiff was hurt.

CROSS EXAMINATION:

I am a deputy sheriff now, and have been an officer ten years. No. 52 made up at Marshall and went to Shreveport.

That train did not come in from the west. No. 52 waited at Marshall for the arrival of No. 2 from the west. No. 2 would come in on the main line from the west, and that would leave it between the depot and No. 52. The purpose of No. 52 waiting for No. 2 was so that passengers on No. 2 wishing to go to Louisiana could get off No. 2 and get on No. 52. There was a man stood on the north side of No. 2 and directed those who wished to take No. 52 to get off on that side, and they would have some one there on the north side to assist the passengers down and would have a step box there. At the same time the passengers for Marshall would be unloaded on the south side, and they would have a step and employe stationed there. No. 2 was a short train, and if they did not have passengers on the sleeper, they usually had just once place to get off and on, and that was generally between the second class coach and the chair car. They have two places to get off on most all trains on account of the negro passengers and may have had on that train. The white passengers usually come out of the chair car. Persons getting off No. 2 for No. 52 on the north side would always get off on a stool. They always had a stool there for them, and the same method was pursued on the south side of No. 2, and when they took up the stools that was evidence that they were through with the passenger work, and the express and baggage work and that the train was about ready to go. I think No. 52 always left after No. 2. I have seen people who had been to No. 52 cross over No. 2 to the depot side and not wait for No. 2 to pull out, and I have done it lots of times myself. I just took the chances and crossed over, without asking anybody whether No. 2 was going to move and did not look out for signals or anything like that. I have known people to wait for No. 2 to pull out and then cross over. As a rule I think No. 2 had a coach and chair car and a baggage car and express car. The rear end of No. 2 would stand about the west side of the Ginocchio Hotel. I have seen a good many ladies cross over No. 2, but could not give their names. Have seen men cross there who were not employes, but could not say how many. If persons pass-

ed around the train and down by the express car, they would take chances of express packages falling on their heads. If they went around the east end of the train, they would have to pass the express car. Of course a man would not have to go close enough to the trucks or car for express to fall on him.

LOUIS W. KARIEL TESTIFIED BY DEPOSITION FOR PLAINTIFF:

Am 16 years of age, resident of Marshall and at present attending school at Austin. Was with the party that accompanied Mrs. Winters and her two children to the station at Marshall on the occasion when Miss May Marcus was hurt. The sketch attached to the interrogatories correctly represents the conditions at the depot on that occasion and the location of the two trains. At the time plaintiff was injured May Marcus, A. Marcus, Adrian Marcus, M. L. Weisman and Mrs. Sam Wolf and myself were returning home from the station. We lived south of the tracks of the defendant. Our party went to the Shreveport train with Mrs. Winters and remained about five minutes, and No. 2 was standing between us and the depot at the time we started to return. We went upon the platform of No. 2 to cross it, and started across about three coaches from the rear end of the train. The order in which the party crossed was Mr. Marcus first, then Miss Adrian, Miss May, Mrs. Wolf, M. L. Weisman and myself. The train was standing when I got on the steps to cross over and moved before I got across. At the time the train moved I was on the top step going up on the platform of the car. A Marcus and Miss Adrian had alighted on the ground on the opposite side, and Miss May was about to alight on the other side, and Mrs. Wolf and Mr. Weisman were on the platform at the time the train started to move back. It started with a violent jerk and kept on moving down the track. Miss May was preparing to step off and alight from the car. She fell or was jerked to the ground. There were no signals given on the north side of No. 2, neither were there any bells or whistle blown

to indicate that the train was about to be moved. There were no signals given on either side of the train, and I heard nothing said by any person on either side of the train to indicate that the train was about to be moved. Plaintiff's leg was broken. She was confined to her bed about three months, and to her room about six months and I saw her nearly every day during that time. She suffered excruciating pain as a result of the injury and has not recovered from the injury. The plat does not give the correct length of the train hence I have marked the letter A two coaches from the west end of No. 2 so as not to get too close to the front of east end of the train, though I have testified that we crossed about three coaches from the west end of the train.

CROSS EXAMINATION:

Th party crossed over the track to the Shreveport train before No. 2 came in, and remained there five minutes and then climbed over No. 2. It was dark. Don't know why the vestibule doors were open. Did not see the conductor. Plaintiff fell about on a line with the east wall of the Ginocchio Hotel and near its corner.

DR. J. A. MOORE TESTIFIED FOR DEFENDANT:

I am a physician and surgeon and a graduate of Vanderbilt University, and am Chief Surgeon of the defendant at Marshall. I made an X-Ray picture of the foot and ankle of plaintiff for Dr. Rains several months after she was injured. The picture showed that she had a fracture of the lower end of the small bone and the internal muscles jerked loose. The bone just above the ankle joint was fractured. They would seem to have repaired as well as could be expected. The bone had united in good apposition, and the inside bone which was also fractured had united in good apposition as well as the picture disclosed. I looked at the plaintiff's foot and ankle. The prognosis is favorable. Plaintiff is a little heavy on her feet and it would make recovery a little slow probably. I think manipulation and use of the ankle will help it. I think that is the proper thing

to do, and would help to cure it. The picture was made two or three months after the injury at the request of Dr. Rains and I gave him the picture.

CROSS EXAMINATION:

I believe the prognosis to be favorable for plaintiff's recovery. The treatment by Dr. Bennett might have been helpful and might have been the proper thing to do. I would consider treatment by massage and manipulation beneficial. I do not think that treatment kept up for a year would bring about as good results as might be expected. I think any fracture and especially one about a joint, continues to improve with years. I do not think it is generally conceded that whatever improvement and repair is going to take place will come about in twelve or thirteen months. I don't think that is generally expected by the profession. If the medical books teach that whatever improvement will come about will take place in the first two years, they are in error. I think there is a gradual improvement in any injury around a joint as time goes on. I could not say that as the patient grows older the injury gets worse and gives more trouble. I don't think that is a part of the medical teaching. Sometimes the condition of the weather effects injuries of that kind. All a physician can do with fractures is to put them at rest and in proper position and let nature repair. I think a joint that has been stiff for two years would improve with time. I think a skilled surgeon could tell whether there was improvement in an injury of that kind. Assuming that there has been no improvement in the condition of the ankle for twelve months or eleven months, I would think that would indicate that there would be no improvement in the future.

RE-DIRECT EXAMINATION:

If there had been improvement during the treatment of the osteopath and none since he stopped I think a renewal of his massage and manipulation would bring about further improvement.

J. H. WILDER TESTIFIED FOR DEFENDANT:

I am 68 years of age and have been a locomotive engineer in the employ of the defendant since 1877. I was the engineer in charge of the engine pulling No. 2 Oct. 15, 1911. My run was from Marshall to Texarkana. On the occasion in question when the train was ready to move I gave the back up signal. I started the bell to ringing before I got the signal to back up, and it continued to ring until I shut it off. The engineer manipulates the bell. I started the bell to ringing because I wanted to hurry them up, and I did not shut it off until I got the signal to back out. The bell continued to ring from the time I started it until we got out on the Y. The train started the same as it does any other day. The custom in starting the train from the station is not to jerk it, and that is rather a hard place to start, being on a grade, and we had eight cars I think. The engine was a medinum sized engine and had sufficient power to back the train out. It is the custom to start the bell before the engine moves. There is a little valve in the cab that I turn about an inch, and that starts the bell ringer and keeps it ringing; it rings automatically, and in case it does not work, we have the bell cord to ring it with. The air valve that worked the bell was in good shape that day, and I did not have to use the bell cord.

CROSS EXAMINATION:

I first heard of the injury to plaintiff one or two or three days after it happened. I do not remember the day of the week that she was injured. We had eight cars altogether. Coaches are 52 to 72 feet in length and will average about 60 feet, and the engine and tender about 60 or 65 feet long. The engine was standing just west of the Elgin Hotel, and the rear of the train would be about 540 feet west of the front of the engine. I did not know anything about the injury until I heard of it through the company. It was the custom to ring the bell before starting, and when I was notified that there had been an accident there I remembered well ringing the bell, and the conductor gave the signal to

start. He was standing by the express car. It must have been 20 seconds or more after I began ringing the bell before we started back. I got a signal from the conductor and backed out. I do not know where any of the other men of the crew were except the porter. I think the porter was on one of the coaches. I was not looking for the rest of them, but was looking for the conductor to give the signal. He was the only man I was interested in. He came in from Fort Worth and I picked up the train at Marshall: I have been on that particular run about 22 years.

R. H. BORTLE TESTIFIED FOR DEFENDANT:

I am a locomotive fireman and was firing the engine pulling No. 2 on the night plaintiff was injured at Marshall. Mr. Wilder was engineer. I have no particular recollection as to whether the bell was ringing as we backed out that night, but it is the rule for it to ring. I don't remember whether it was ringing that night or not. I had been firing for Mr. Wilder about 3 years. The engineer handled the air valve that rang the bell. Mr. Wilder was very careful about ringing the bell and would not move unless it was ringing. If anything went wrong with the bell ringing, Mr. Wilder would ring the bell by means of the bell cord. To my knowledge, he never moved out of a station without ringing the bell. The track at Marshall is up grade going west from the station at Marshall and hard to give the train a jerk there backing out, and Mr. Wilder was always careful about jerking the train.

CROSS EXAMINATION:

All I know is that the bell ought to have been ringing, and Mr. Wilder was in the habit of ringing it, and was very particular about it. If he had not rung the bell, it would have been so unusual that I would have noticed it. I would not be putting a fire in the engine there; I would not put the fire in until after the engine started out. I would wait until they commenced to work the fire before I put in more coal. We would not put in a fire there on account of the

nearness to the hotel. I have no independent recollection of that evening or what occurred and what did not occur. All I can say is that it was the rule to ring the bell before starting the engine, and Mr. Wilder was particular about it.

L. A. FOWLER, A WITNESS FOR DEFENDANT, TESTIFIED:

I am a conductor in charge of one of defendant's trains and was in charge of No. 2 at Marshall the evening of October 15, 1911. That evening we arrived at Marshall with nine cars and left Marshall with eight cars. We set out a sleeper and chair car from the rear end of the train, which were the second and third cars from the rear, and put back one car, a dead-head sleeper. The switch engine did this work. There was nothing taken out of the front end of the train, but I believe a baggage car was put in the head end of the train. My record shows that we picked up an I. & G. N. express car there at Marshall and took it to Texarkana, that is the way it was. I am almost sure that car was attached to the engine at Marshall, express car No. 7 was coupled to the engine; they run it right back there before the other engine was attached. The road engines are changed at Marshall. In order to take out the two cars at the rear end, the switch engine would couple to them and put them on train No. 52, and then bring the other car back, and then bring another car back and place it on No. 2. When we got into Marshall that night I went to the telegraph office for orders. That office was on the north side of the track, and was also north of the track the Shreveport train or No. 52 was on. I had to pass 52 to get to the telegraph office and get my orders. I then returned to my train and took a stand near the baggage and express cars and watched the loading and unloading of baggage and express and saw when that work was done, and when that was done we were ready to leave. The first car was a combination baggage and express car and the next would have mail in it and express too probably. I had five cars besides those three and then I had three dead head cars in the train, eight in all I believe,

and I know those cars were ahead of my regular equipment; I don't know the exact arrangement of the dead-head cars. I saw that the passengers were loaded and unloaded and then I looked about the baggage and express. We were doing the work altogether from 10 to 18 or 20 minutes. My records show that we were delayed 10 minutes, and we had 10 or 15 minutes dead time. We were at Marshall probably 15 or 20 minutes. When we were ready to go I called "all aboard" and gave the signal to back up, and I instruct the crew when I holloa all aboard to hold their lanterns up to recognize my call, and I know by that that everything is clear and the train ready to move. At junction points such as Marshall I say "all aboard" twice, and sometimes if the passengers are a little slow, three or four times. I know I holloaed all aboard on this occasion. I don't know that I holloaed all aboard more than once, but I usually do two or three times. I had a chair car porter stationed at the front of the chair car, and a porter at the rear to watch the rear of the train, and he is kept there backing out so he can stop if necessary. He can there stop the engine and train without a signal to the engineer. The porter at the rear end of the train held up his lantern, which indicated that everything was all right. I then gave the engineer the back-up signal. The back-up signal is given with a lantern at night and is supposed to be at arm's length across the track. It could not have been very long after I holloaed all aboard before the train started, because I do not say that until the train is ready to leave. I suppose there was an interval of thirty seconds or may be a minute. I looked down to the porter after that to see if everything was all right. I did not see the plaintiff that night. I boarded the front end of the smoking car next to the baggage end of the combination car. I always holloa "all aboard" pretty loud and did on this night. I holloaed in the usual way. I know the bell was ringing as the train moved out.

CROSS EXAMINATION:

The bell was ringing when the train started. He start-

ed the train after he started the bell to ringing. I don't know how long it was after I gave the signal to back up before he started the train, but just a few seconds, just as soon as he could start the train. We were late, had been delayed a little over the dead-head time. We used up the ten minutes allowed and then were delayed eight minutes after that. That would indicate that we were there 18 minutes. I have no distinct recollection of what was done that night any further than what is usually done. I learned of the injury to plaintiff as we were going around the Y before we got out of the city limits that night. Had nine cars arriving at Marshall and eight leaving there, and the engine. I think from draw-head to draw-head the cars were 64 feet. I do not know the length of an engine and tender; a sleeper would be about 64 feet. The length of the cars is guess work with me. The crew was composed of the engineer and fireman, conductor, auditor, colored brakeman or porter and the chair car porter. I don't know how many places were open for passengers to get on and off, not counting the Pullman. It was customary to open the front end of the smoker and the front end of the chair car on both sides, which would make two places and four openings. The front end of the sleeper was also open with the Pullman porter and conductor in charge. As far as the front part of the train was concerned, there would be two places open. The train porter was supposed to be at he rear end of the train when we were ready to leave, and the chair car porter was supposed to be at the front end of the chair car. The porter or conductor either one could be at he front end of the smoker. I commonly get on the front end of the smoker going out. It was not only the duty of the chair car porter to be at the front end of the smoker, but on the night in question I got the signal from him by his light being raised over his head, and I also got the same signal from the rear end of the train. If the chair car porter was there, he could see persons crossing the train on the platform. I don't think he would have given me the signal that everything was all right and people crossing the platform. I don't think

it would be proper to start the train under those circumstances. I would not do it if I knew it. I would not start the train out of there with a lady on the bottom steps just ready to step off, if I saw her, but I have seen them do that after the train started; they would come and hug and kiss good bye and wait until the train started and run over you when the train did start to get across it. I would not start my train with anyone in a hazardous position if I knew it. Of course the position you have described would be a harazdous one. If two or three of them were on the steps trying to get off and others following them, it would be hazardous to start the train. It would not be proper for the trainmen or me to give the O. K. signal if those people were in that position and I knew it. The porter was supposed to be there to ascertain if everything was all right. I could not answer why the vestibule door on the north side of the train was not closed as soon as the passengers left No. 2 for the Shreveport train. It is not left open for the purpose of permitting people to pass over the train at the rear end of the chair car or at the front end of the chair car. It is opened for the purpose of discharging passengers for the Shreveport train or the city. Passengers for Marshall get off on the south side and those for the Shreveport train on the north side. We leave the doors open so people can pass to and from the Shreveport train over the steps of No. 2, and the equipment is arranged that way. That same condition has existed as long as we have had vestibules.

RE-DIRECT EXAMINATION:

I will state that under conditions such as existed the night the plaintiff was hurt the car men have to cut out three cars from the train, and it is necessary for the vestibules to be left open to permit the car men to pass from one train to the other. I mean between the cars, and make the cuts of the air hose and turn the whistle signals. I don't know whether the vestibule between the sleeper and the chair car was opened by the train crew or some one that happened to be there. They are sometimes opened by people

who want to get through. We had the vestibule open for the purpose of discharging passengers for the Shreveport train on the north side and passengers for Marshall on the south side. The doors were not left open for the purpose of creating a passway for people who happened to be on the north side and wanted to come to the south side, but the doors were left open for the accommodation of the passengers and the train crew and employes. We generally have it so arranged that there will be some one to protect the openings on either side, and after the passengers are received and discharged, the men leave those places to look after other duties they have to perform there. The passengers discharged on the north side are supposed to be those who wish to take the Shreveport train, and we discharge all on the south side who do not wish to take the New Orleans train. We are supposed to take on passengers from the north side if they are there. It is not the usual practice for passengers to get on No. 2 on the north side. The porter when he gets through on the north side leaves there unprotected for people who want to get on.

RE-CROSS EXAMINATION:

We hate very badly to have the door on the north side closed and some one want to run across the train. He would claim we had the vestibule closed and he got left. We leave it open so they can cross when they want to for convenience both ways. The porter will go to the south side to receive and discharge passengers because that is the side the station is on and the passengers will be on the side next to the station. It is the business of the porter to protect the opening on the south side of the train, and I suppose he would have sense enough not to give me the signal when he saw anyone in danger of being hurt. I had no jurisdiction of the auditor; he was lifting transportation and I had nothing to do with him. He had nothing to do at stations; he was the auditor of the train and lifted transportation. I don't know anything about that part of the proposition at all.

RE-DIRECT EXAMINATION:

We did not expect passengers to board the train from the north side opposite to the station. We expected them on the same side the ticket office and station was on.

J. H. HILL TESTIFIED FOR DEFENDANT:

I live at El Paso and work for the defendant. I lived at Marshall in 1910 and worked for the defendant there and have worked there once since; worked there two months and a half last summer. I worked in the yard at Marshall altogether about 12 years and that ended regularly in 1910. I was foreman of a switch engine in the Marshall yards and that caused me to be about the passenger station and passenger trains. I remember train 52 that was made up at Marshall and train No. 2 that came in from the west. I know the manner in which they came in, the tracks, etc. I would be about the trains and see the vestibules. They would open the vestibules on the north side of No. 2 when No. 52 was there for passengers to change from 2 to 52. The yard crew would take off cars from No. 2 and put them on 52. The yard men would not use the vestibules; we did not cross between the cars; we cut the cars off No. 2 and put them on 52. Some passengers for 52 would get off on the north side, and the other passengers would get off on the south side next to the station. I have seen some people cross from the north side to the south side of No. 2 over the platform and down the steps, but it was not a general thing. The business of No. 2 was done on the south side of the train. The express and baggage business was done on the south side, and the passengers got off on the south side and got on on the south side. If we had to take cars off No. 2 or attach cars to No. 2 the yard crew would do the coupling and uncoupling. The car men uncoupled the air hose; we are not required to do that; we do not uncouple the safety chains. We uncouple the cars by raising a lever and that is all outside the car. The yard men don't have to work on both sides of the train. In coupling the air hose

the car men have to cross to both sides of the train. There is a hose on the north and one on the south side of the car. They have to use the vestibules or crawl under the cars.

CROSS EXAMINATION:

The switch crew go to the end of the train with the engine and cut off the cars, and put on as many coaches and sleepers as are wanted on the Shreveport train. We take them there and attach them to the Shreveport train, and that is the end of the service of that crew, and the car crew put out the markers for the train, the lights or flags that indicate that that is the end of the train. People did cross from the north side to the south side of No. 2 over the platform and steps, and that condition had existed for a number of years prior to the time the depot was moved. The vestibule on the north side was usually left open until No. 2 left town. I have seen the porters close them before the train left, but they are generally left open. At the end of Washington Avenue the public generally use the tracks to pass over in going north to and from their homes. There is quite a lot of travel there at all hours of the day, and perhaps more late in the evening than at other times. I would not say I ever saw No. 2 at the station when I did not see people crossing over it from one side to the other. It was a frequent occurrence for people to go to No. 52 to see relatives and friends off on that train, and in some instances I have seen those people come back to the south side over No. 2. I have seen them go around No. 2 at times. I have never seen women cross No. 2. It was no part of my duty to pay attention to the people that crossed there. I have nothing to do with regulating the traffic across that train. I do not advise them to cross it or not cross it. No. 52 generally waits for No. 2 to back out before the conductor hollaos "All aboard." I do not recollect an instance when No. 52 left first. I have paid attention to the leaving of the two trains. I have seen some people cross No. 2 over the platform between the cars.

RE-DIRECT EXAMINATION:

People go down to the depot and stand around there, and I have sometimes seen them cross over No. 2.

JOHN QUINN TESTIFIED FOR DEFENDANT:

Live in Louisiana and am employed by the New Orleans Credit Men's Association as collector, and am not at this time connected with the defendant. I was working for the defendant October 15, 1911, as a freight brakeman on the Louisiana division. Remember the occasion of plaintiff being hurt and saw the occurrence. I was standing on the south side of the Ginocchio Hotel at the time facing the track. I was on the sidewalk 40 or 50 feet from the track. I was on the left hand side facing the main line, the depot being on my right. I heard the conductor holloa "All aboard," and about the time he holloaed or maybe 10 or 15 seconds later, I noticed these people coming over the train. The voice of the conductor was so loud that I thought he must be a man with powerful lungs. When I saw the people it made the impression on me that they would have to stay on the train or fall when they got off. I called the attention of Mr. Eaton and Youle to the fact that they would have to stay on until some one stopped the train. The conductor holloaed and that made the impression on me that the train was going to start, and I heard the engine bell. The people were then going over. The gentleman got off and a young lady right behind him, and the other young lady was about to get off and there was a gentleman behind her. When the plaintiff got off, it seemed to me that she jumped out flat footed. She got off right in front of me at the hind end of the coach, the west end of the car the way the train was standing. She got off just diagonally across from me, and about 40 or 50 feet from me. I saw four people there. I didn't see a train man there where they got off. Train men are supposed to wear uniforms and that was a rule of the company. I saw no train man there at that place. Up is upgrade there and the train started smoothly. I heard the bell ringing.

CROSS EXAMINATION:

I was a brakeman on the Louisiana Division at that time and was at the hospital at Marshall with Mr. Easton, a brakeman on the Marshall Division. After plaintiff fell a gentleman helped her to the sidewalk and I walked into the hotel. When the conductor holloaed all aboard I judge he was around the baggage or express car on the south side of the train next to the depot. I do not know where the other employes of the train were; I did not see them; did not see the negro porter or a white brakeman, and I don't think they had white brakemen at that time. I saw neither of the porters nor the conductor. Saw no person at the opening where the people were coming across. I was not familiar with the manner in which those trains were handled at Marshall at that time; was a stranger in the town so to speak. Did not see the conductor's light when he signalled the train, the train did not stop after it started back. I saw a light between the day coach and the chair car. I don't know whose light it was. I saw the light on the east end of the day coach, that is where I saw it. That is the only light I saw except the coach lights, that was the only employe I saw with a light at all. When the conductor holloaed "all aboard" I don't suppose more than two of the people were on the vestibules. I would say the foremost one and the one coming next were in the vestibules and the others coming up. Could not say how many had boarded the steps of the train at that time. The third one off fell, a young lady. There was not more than a second or two between their getting off, just as quick as they could step off. They did not appear to be delaying but seemed to be hurriedly getting off. They were getting off as rapidly as they could. The train started in 15 or 20 seconds after the conductor said "all aboard." I don't know how long it took the lady and gentleman in front to get off. The gentleman and lady got off before the train moved, and it moved almost immediately after the first lady got off. I saw the conditions when the conductor holloaed all aboard. From my standpoint they were in a dangerous position. I watch-

ed them until they got off. There were more than two people getting off. I saw the two in front and another young lady and a young gentleman. There was a young man behind the lady that fell. It is not a fact that next to the lady that fell was another lady. I didn't see but four of them. I did not see another lady and an old gentleman at all. I did not see Mr. Mose Weisman and another lady get off the train. I could not say whether they got off the train or or not. I say I did not see them. I am positive that neither of those two people got off before the young man did. My opinion is that they were not on the train at all, for there would have been no possible chance for them to have gotten off.

RE-DIRECT EXAMINATION:

After the young lady fell my attention was attracted to her condition, and I was afraid that the wheel or spring or oil box or something would hit her. I thought she might have slipped and her legs were under the wheel. I saw them lift her up. She hopped on her left foot across the way. I did not notice much about the other people after that. I heard the conductor holloa "all aboard" before I saw the people on the train.

H. L. EATON TESTIFIED FOR DEFENDANT:

Live in Marshall and am a brakeman for the defendant, and I held this position in October, 1911. I saw Miss Marcus hurt, and was standing at the corner of the Ginocchio Hotel. I saw her as she fell. She fell close to the corner of the sidewalk of the hotel. I heard the conductor holloa "all aboard" and that is what first attracted my attention. It attracted my attention to the people jumping off after the train started to moving. It must have been a couple of minutes from the cry of all aboard until the train started to back. I knew Mr. Marcus by sight at the time and I think he was the first one that got off. He got off after the conductor holloaed. I don't think any of them had gotten off the train before it started to move. Mr. Marcus was

the first to get off and then I believe Miss May was second. I saw Miss May when she fell; that is what attracted my attention. She jumped off the train and fell to the ground; she fell to her knees. The train could not have been going faster than two and a half or three miles an hour at that time. I think a young lady got off after Miss May. After Miss May fell my attention was attracted to her and not to the others. The bell on the engine was ringing when the train started. I knew the train was going to start when I heard the conductor say "all aboard." I knew it was ready to start. I had nothing to do with the train. I was with Mr. Quinn and talking to him at the time. He had nothing to do with the train. I saw no employes of the company at the steps where the plaintiff got off.

CROSS EXAMINATION:

The conductor said "all aboard" and the bell immediately starts to ringing. I don't remember just when it started to ring on this night. The bell should have gone to ringing and I assume it was ringing. It ought to have been about two minutes after the bell, I mean after the conductor holloaed that the train started. When I heard the conductor's cry he must have been about two car lengths below that towards the baggage car. I think he was there at this time because that is the custom. I did not notice the people on the train when he holloaed all aboard. I really did not see them until the train started to move. It is my recollection that the train was moving when Mr. Marcus got off. It is my recollection that plaintiff was next to her father, and it is my recollection that another young lady followed plaintiff. The fourth person was a man, but I don't know who he was; I believe he was a young man. I did not know Mr. Mose Weisman at the time and I would not recognize the man now. It is my recollection that three ladies got off. I am almost sure that the lady that followed Mr. Marcus was the one that got hurt. I was mistaken, only two ladies and two gentlemen got off, not three ladies and three gentlemen. If the train had been standing still when Mr. Marcus and

the lady next to him got off, it would not have attracted my attention. I am sure the train was moving when Mr. Marcus got off. I don't know where the people were when the conductor holloaed "all aboard." I did not see the conductor give the back-up signal, and did not see a lantern signal given by anybody. Did not see a porter about the train hold his lantern above his head. The conductor ought to have given the back-up signal after he holloaed "all aboard," but I did not see it. I was looking at the lady after she fell.

H. DODD TESTIFIED FOR THE DEFENDANT:

I live at Fort Worth and am a train porter for the Texas & Pacific Railway Co., and held that position in October, 1911. I heard of the occurrence of the plaintiff getting hurt, and I was at Marshall on the night it is said she was hurt. I was porter on train No. 2 that night. When the train arrived at Marshall I discharged the passengers at the front end of the smoking car both colored and white. I was not at the entrance between the smoking car and the chair car. After I got through there I went to the baggage car, and I then went back to the rear end of the train to ride the back end out of Marshall; there had to be some one on the back end as the train backed out. I raise the light when the train is ready to go. I gave the conductor the signal that everything was all right and he holloaed "all aboard" and gave the back-up signal. After the conductor holloaed all aboard I got on the rear end of the train and rode it out. The car I rode out was a Pullman. The cars were taken from the rear end of No. 2 that night after it arrived at Marshall, a chair car and a Pullman and another car was put back. Ater this was done the rear end of the train was some feet west of the west side of the Ginocchio Hotel, and the east end was east of the Hotel. After the train started back I looked towards the rear end of the train and saw some people standing at the east corner of the Ginocchio Hotel. I did not see anybody fall. The gathering of the people attracted my attention, and I afterwards mentioned

to the conductor about the people gathered there and said some one might have got hurt. The train had just started to backing and was going when I saw the people gathered there.

CROSS EXAMINATION:

When I got through discharging the passengers I left the opening and went to the baggage car. I had work to do there loading and unloading baggage. I then went to the rear end of the train. There was a baggageman on the car and one at the station, and it is their duty to handle the baggage. The Pullman to the rear end of which I went was a dead-head car, and I expect there was a Pullman porter inside, but he did not have any business outside. That car was not carrying passengers. I guess a minute or a couple of minutes after I gave the conductor the signal that everything was all right the train started back. The conductor holloaed "all aboard" about a minute or two before the train started. No other notice was given after he holloaed all aboard before the train started unless that the bell was ringing. I remember distinctly that the bell was ringing, and it started to ring before the conductor holloaed all aboard, but I don't know how long before. The bell continued to ring until we got around the Y switch and started ahead. I don't know how far the rear end of that train was from the bridge west of Marshall. I believe the engine was standing down about the Elgin Hotel. The rear end was about two and a half car lengths east of the bridge.

L. A. FOWLER, BEING RE-CALLED BY DEFENDANT, TESTIFIED:

All the members of the train crew were in uniform. The schedule time of the train to arrive at Marshall was 7:10 and my record shows we arrived at 8:41, being an hour and a half late. Coming into Marshall the vestibules at the front end of the smoking car and front end of chair car are opened. The vestibules at the rear of the train are not always opened by the crew of the train. When it is necessary

to set out cars or take on cars they have to have the vestibules open to permit the men to go backward and forwards to do their work. When we got ready to leave that night I did not go and look at the vestibules to see whether any people were going to cross from the north side because it was not customary. I was not expecting anybody to come from the north side across because it was not the place for receiving and discharging passengers. Passengers got off on the north side for the train standing there, No. 52, and they were assisted off on the south side for Marshall. Sometimes passengers got on No. 2 on the north side, but I could not remember any particular time, and I have no recollection of any that night. It was very seldom that anybody got on that way. No. 52 is made up at Marshall, but we did not expect passengers for No. 2 on the north side because it was not customary to load them from that side. There was no place for them to stand there except on the ground between the two tracks. The north side was not at all the usual place for passengers to board No. 2.

CROSS EXAMINATION:

I have seen people go into and come out of the Ginocchio Hotel, but I do not know whether they would leave the hotel to go to the train or left the ticket office to go to the train. The vestibules have a spring at the bottom that holds it down and you pull that spring up and release the vestibule and fasten it to the wall. After the door is open, there is a bar that fastens it and holds it open. The vestibule is not supposed to be opened from the outside, but it might be in a way. If it is in proper working order, it would be impossible to open it from the outside—that is, if everything is in shape. I did not handle equipment that is not all right.

T. Y. ADKINS TESTIFIED IN REBUTTAL FOR PLAINTIFF:

Have lived in Marshall 63 years and know Mr. Marcus and his daughters. I remember the occasion when plaintiff was hurt, and at that time I was standing by a tree a few

feet from the corner of the Ginocchio Hotel, just a few feet away. I saw plaintiff as she fell. I saw one of the ladies fall, but did not know which one it was at that time. The train was just starting as she fell. I heard no signals given by anybody before the train started. I did not hear the bell ring. The falling of the lady was what called my attention to the matter.

CROSS EXAMINATION:

I was standing on the north side of the park at the first tree. I did not see Mr. Marcus and his party before the lady fell. I had just walked over there and was standing there when she fell. I had put in a call for a party over the telephone and was waiting for the call; they said the party would answer in about ten minutes. I did not notice how far east of there the engine was. The lady falling attracted my attention, and I had not paid any attention to the matter before that. I did not see the conductor. I was just waiting for the time to come for me to go back to the telephone. If the bell rang I did not hear it; I would not say it did or did not ring. I merely say I did not hear it.

ROBERT ROBERTSON TESTIFIED FOR PLAINTIFF IN REBUTTAL:

I live at Marshall and have lived there about 33 years. I drove a hack for Coke's Stable, and have been driving a hack in Marshall 14 years. I met the defendant's trains known as No. 2 and No. 52, and know how those two trains stand at the depot in Marshall. I remember the circumstances of the plaintiff being hurt. When No. 2 was standing at the station, passengers for No. 52 would cross over No. 2 between the coaches, and I would carry baggage over for them. Women and children would cross over No. 2 as well as men. That custom existed during the time I was going to the trains and up to the time the location of the depot was changed. When people would go to No. 52 to see relatives and friends off on that train, they would come back to the south side of the railroad over No. 2—that is, over

the platform between the coaches. I have carried lots of them over there, and others went over.

CROSS EXAMINATION:

Some people who wished to take passage on No. 52 would go that way to that train before No. 2 came in and others would be slow, and would go over No. 2 after it came in. Nearly all the people did not go to No. 52 before No. 2 came in. Lots of times the ticket office would be crowded and No. 2 would come in before the passengers for No. 52 got tickets and they would have to cross over No. 2. I would carry baggage across for people who came to the station in my hack, and for others I knew who did not come to the station with me. People for No. 52 would cross No. 2 or go around it, and they generally crossed it. I never did see them wait for No. 2 to come in and go out of the station and then cross over to No. 52. I have to work No. 2 when it comes into the station—that is, got passengers from it to take in my hack to their homes. If I don't get the passengers right when No. 2 comes in, I don't get them at all. Some of them see my hack and know me and stop at my hack. I have had people to wait for my hack until I carried passengers for No. 52 across No. 2. They would open my hack and get in and wait for me. I have carried people down to the depot and the ticket office would be busy and train No. 2 would come in before they could get a ticket for No. 52 and they would tell me to carry their baggage across there to No. 52, and when the passengers from No. 2 would get off we would go across to No. 52. Sometimes the porter would be at the opening and sometimes the conductor. I would go across when some employe of the company was standing there; that was nearly always the way it was. I have carried people across there to see their friends off on No. 52 and they would come back across No. 2, but I could not name them now. No. 52 stays there until No. 2 pulls out. People on the north side of No. 2 who had gone over to see friends off on No. 52 would not have to wait long for No. 2 to pull out.

MISS MAY MARCUS, BEING RECALLED BY HER OWN COUNSEL, TESTIFIED:

I heard no signals of any kind given as to the intention of the train to move. Mrs. Winters was living at Shreveport. She is now living at Denver, Colorado. She was intending when she left Marshall to go to Shreveport and leave immediately for Denver and that was to be her last visit to Marshall before going to Denver, and that was the last time we expected to see her before she left.

CROSS EXAMINATION:

I did not hear signals and none were given. My hearing is good and was then. I think if a man 400 feet away had given the signal of "all aboard" and me climbing over the vestibule, I would have heard it. I did not hear the bell on the Shreveport train ringing that I recollect now. I don't remember whether I was listening for the bell or not. I was not listening for the call of "all aboard," but my ears were open for any signal to keep me from going over the train. I was depending more or less on the men in the party as to the safety of crossing. I had never been to the depot more than 20 times in my life. I think I would have noticed the bell ringing up about the Elgin Hotel. I don't know whether there was a switch engine close by. Don't know whether I could have distinguished the ringing of a bell on No. 2 from the ringing of a bell on No. 52. I don't suppose I gave the matter of when No. 2 would leave a thought.

A. MARCUS TESTIFIED FOR DEFENDANT:

There was no step box at the place where we crossed between the coaches.

This is all the evidence.

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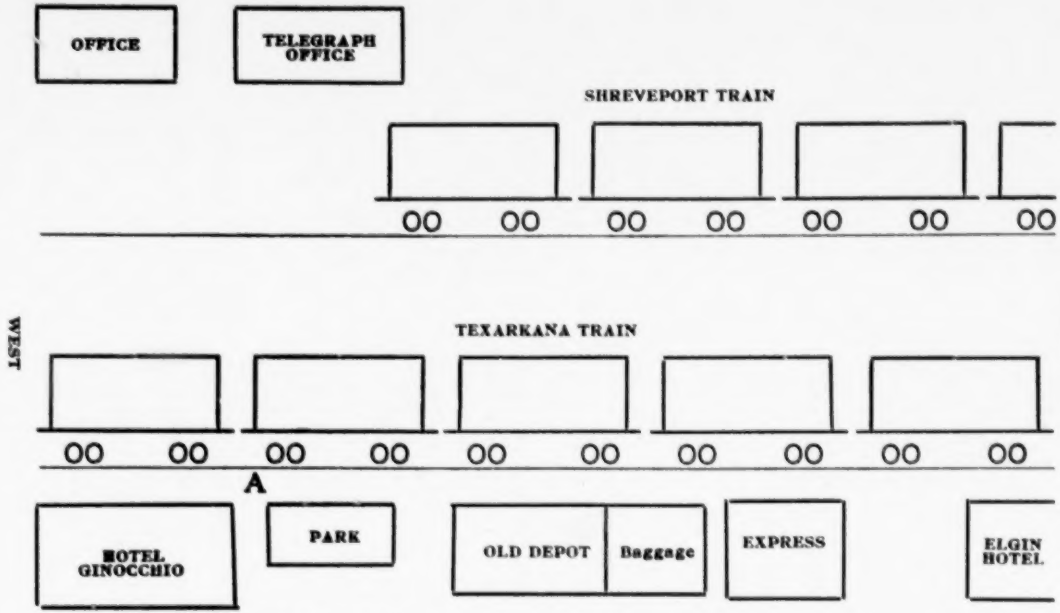


Plat Referred to by witness. "A" where accident occurred

SOUTH

CHARGE. (Delivered Verbally).

Gentlemen of the Jury:

This is an action brought by the plaintiff, Miss May Marcus, against the Texas & Pacific Railway Company, in which she seeks to recover a money judgment for certain injuries which she alleges were inflicted upon her through the negligence of the employes and agents of the defendant company. She alleges that about the 15th of October, 1911, about two years ago, she went to a train of defendant company, which the Court will designate here and hereafter in the charge as the New Orleans train, for the purpose of bidding good-bye to a relative who intended to depart from Marshall, Texas, on that train. She alleges that after she had bidden this relative good-bye she started back to the depot of the defendant company at Marshall, Texas, and that in doing so she attempted to cross another train of the defendant company which the Court will designate as the Texarkana train. She alleges that the Texarkana train which she attempted to cross was what is known as a vestibule train, and one or more of the vestibules in the train had been left open, and that she attempted to cross through this open vestibule in the Texarkana train. She avers that for a number of years it had been the custom of the defendant company to leave the vestibules of the Texarkana train open, so that the passengers of the defendant company, together with licensees about the premises of the defndant company, and the public generally, for a number of years had been accustomed to using the vestibules of the Texarkana train in passing to and fro at the depot and to and from the trains of the defendant company and particularly the train known as the New Orleans train, and that in passing over the Texarkana train she pursued the custom that prevailed at Marshall, Texas, among the passengers and licensees of the defendant as well as the public generally. She alleges that the agents of the defendant company in operating its Texarkana train knew, or by the exercise of ordinary care might have known, that either she or some one

accustomed to so use the vestibule in crossing the train would use it as the time of her injury. She avers that she tried to cross the train at that time, and that after she got on the platform, without warning given the train was put in motion and by a sudden jerk she was thrown to the ground, and her ankle and limb broken and injured as alleged by her.

The defendant company denies the allegations in the petition of plaintiff, and further alleges that if the plaintiff was injured, the injury was the result of no negligence upon its part, but the result of a risk assumed by her in attempting to cross the Texarkana train at the time and place she made the attempt.

I do not claim in this statement of the pleadings to have reproduced in your hearing all the allegations contained in either the petition of the plaintiff nor the answer of the defendant, but at this juncture I have only attempted to state such of them as I think would would throw light on the issues the court will hereafter submit to you in the charge. The pleadings consisting of the amended petition of the plaintiff and the answer of the defendant, will be given to you in your retirement, and you are at perfect liberty to read those pleadings, and from them acquire a very much fuller understanding of the allegations made by the plaintiff and by the defendant respectively than the Court has attempted to give you in the charge. I don't know whether you will consider it advisable or necessary to read the pleadings, but you are at liberty to do so. In the event you do read them, it might not be out of place to say that these pleadings constitute no part of the proof or evidence of either party to this suit. For example, nothing contained in the plaintiff's petition can be accepted by the jury as proof of any fact upon which the plaintiff relies, and nothing contained in the defendant's answer can be accepted by the jury as proof of any fact upon which defendant may rely to defeat a recovery. They are but the instrumentalities which the law provides must be filed by the parties in order to place their case in court and thereunder submit to the court

and jury the facts upon which they rely for a verdict.

Some of the essential elements which it is necessary for the plaintiff to establish before recovery in her behalf can be had will be, first, that she was injured as claimed by her in her petition; second, that the injury was the result of some negligent act upon the part of the defendant's agents upon the occasion in question as set out in her petition; and, third, that at the time of the injury the operatives of the Texarkana train either knew that she was about to cross the train over the platform, or by the exercise of ordinary care could have discovered that she or some other person might reasonably be expected to make the attempt to cross, and in the event these necessary elements are not shown, the plaintiff can not recover.

The burden is upon the plaintiff to show her right to recover by a preponderance of the testimony, and by a preponderance of the testimony is not meant the numerical strength of the witnesses one way or the other, but by that term is meant simply the greater weight and degree of credible evidence.

It may not be out of place for the Court to direct your attention to some of the controverted and some of the uncontroverted issues in the case. For example, it is not controverted that Miss Marcus fell from the Texarkana train of the defendant and was injured. That is not a disputed issue in the case. It is a necessary allegation for the plaintiff to make, and a necessary part of the proof, but in your consideration of the case it may be taken as proven before you that the plaintiff fell from the Texarkana train and was injured. It is controverted, however, as to whether her injury was a direct and proximate result of some negligence of the operatives of defendant's train, and it is a controverted issue as to whether the operatives of the Texarkana train knew, or by the exercise of ordinary care, might have known, that either the plaintiff or some one else might reasonably be expected to attempt to cross the train at that time and place. Those are some of the controverted issues in the case.

Now, the acts of negligence upon which the plaintiff relies—and I will say in this connection that the plaintiff is restricted to the acts of negligence charged in her petition—are the failure of the defendant company's agents in charge of its Texarkana train to close the vestibule doors of the train before starting; the failure to give sufficient warning to those who might be attempting to cross the train before starting; and the method of handling the train, the plaintiff alleging that the train was handled negligently in that the operatives in charge of the train gave it a sudden jerk or jar which caused her to be thrown from the platform to the ground and injured as alleged in her petition.

The jury will observe in the charge it has been necessary to use the terms "negligence" and "ordinary care," and it will no doubt be necessary to make use of those terms frequently in the balance of the charge, and for this reason it is proper at this place in the charge to explain the legal meaning of the terms "negligence" and "ordinary care."

The legal meaning of negligence is the failure to exercis ordinary care. Wherever there has been a failure to exercise ordinary care, that in law constitutes negligence.

"Ordinary care" is simply that degree of care which a person of ordinary prudence would have exercised under the circumstances of the situation, and wherever a party charged with a negligent act has exercised that degree of care which a person of ordinary prudence under similar circumstances would have exercised, then there would be no negligence. Wherever a party charged with an act of negligence has failed to exercise that degree of care which a person of ordinary prudence would have exercised under similar circumstances, then negligence exists, and an issue which you will be compelled to determine in the case is whether the plaintiff has presented before you a case of negligence which would entitle her to recover damages from the defendant. Though the jury may find that the operatives of the Texarkana train committed the various acts which the plaintiff sets out as negligence in her petition, unless you find that those acts were negligent acts—that is, a failure

on the part of the operatives of the Texarkana train to use ordinary care, it would not present a case which would entitle plaintiff to recover. To illustrate: You might find that the vestibule doors were left open, yet unless you further find that leaving the doors open was a failure to exercise ordinary care upon the part of the operatives of the train, such leaving of the doors open would not constitute negligence for which plaintiff could recover damages. Furthermore, though you may find from the testimony before you that before the Texarkana train started on the occasion in question the operatives failed to give any signals or warnings of its purpose to start, yet unless you find that such failure to give signals or warnings was a failure to exercise ordinary care, it would not be negligence to start the train without signals. Again, to illustrate: Though you may find from the evidence before you that the engineer in charge of the Texarkana train operated the engine by giving it a jerk or jar which produced the fall of plaintiff from the platform to the ground, yet unless you further find from the evidence that such method of handling the train by the engineer was a failure to use ordinary care, his method of starting the train would not constitute negligence which would entitle plaintiff to recover. You must believe from the evidence not only that the operatives of the Texarkana train failed in the particulars set out in the plaintiff's petition, but must find further that the acts of negligence alleged, taken singly or collectively amounted to a failure on the part of the operatives of the Texarkana train to exercise ordinary care. Where you find those acts were committed, and that either taken individualy or collectively they amounted to a failure on the part of the operatives of the Texarkana train to exercise ordinary care, then such acts would constitute negligence which, if they directly and proximately caused the injury to plaintiff, would entitle her to recover.

(Applying the propositions I have announced to the facts in evidence before you, if you find from a preponderance of the testimony in this case that the plaintiff, Miss May Mar-

cus, on the occasion in question, was returning from the New Orleans train of the Texas & Pacific Railway Company to the station of that company or to her home in the City of Marshall, and that in so doing in crossing the Texarkana train of the defendant company, she was thrown to the ground and injured, as claimed; and if you further find from a preponderance of the evidence that the operatives in charge of the Texarkana train either knew that Miss Marcus was about to board the train for the purpose of crossing it, or if from all the circumstances before you you believe that by the exercise of ordinary care they could have discovered that she or some one else might be reasonably expected to attempt to cross the Texarkana train at that time and place and if you further find from a preponderance of the evidence before you that the operatives in charge of the Texarkana train failed to close the vestibule doors and started the train without giving any signal or warning that they expected to set it in motion; and if you further find from a preponderance of the evidence that the train started, Miss Marcus being upon the train under those circumstances, by a sudden jerk or jar and she was thrown to the ground and injured, and you further find from all the evidence before you that the acts of failing to close the vestibule doors and failing to give proper signals that the train was about to be set in motion and starting the train with a sudden jerk or jar, taken individually or collectively, amounted upon the part of the operatives in charge of the Texarkana train to a failure to exercise ordinary care—that is, such care as a person of ordinary prudence would have exercised under similar circumstances, and that this failure was the direct and proximate cause of her being thrown to the ground and injured, then plaintiff would be entitled to recover.) While that is true, the converse of the proposition is also true. If you find that the testimony does not warrant you in concluding either that the operatives of the train knew Miss Marcus had boarded the train for the purpose of crossing it, or by the exercise of ordinary care might have know that she or some one else was liable to go on the

train for the purpose of crossing it, or you fail by a preponderance of the evidence to find that the defendant company's agents in charge of the train were guilty of some act charged in the petition that amounted to negligence, you should not find for plaintiff, but find for defendant.

In this case, gentlemen, the defendant company, among the other defenses which it has plead, has suggested that the plaintiff ought not to be entitled to recover because on the occasion of her injury she was herself guilty of contributory negligence or negligence which contributed to her injury. It is a principle of law that a plaintiff can not recover for the negligence of a defendant where the plaintiff in the case has been guilty of some negligent conduct on his or her part which contributed to produce the injury, and this rule obtains notwithstanding the jury may find a defendant guilty of negligence which contributed to the injury. The proposition is this: Contributory negligence is some negligent act upon the part of the plaintiff, which, concurring with some negligent act upon the part of the defendant, contributes to produce the injury complained of, and in measuring the care which the plaintiff herself must have employed the same definition of negligence which applies to the defendant and which I have given you applies to her. If the plaintiff herself failed to exercise ordinary care for her own safety, and that failure on her part contributed to produce the injury of which she complains, then she can not recover, even though you find from a preponderance of the evidence that the defendant's operatives in charge of the Texarkana train were also guilty of negligence in the particulars set out in the petition, it being a principle of law that before a plaintiff can recover by showing negligence upon the part of a defendant, the plaintiff must be free from negligence on his or her part. So in this case, if you find from the evidence that the plaintiff, Miss May Marcus, on the occasion of her injury did anything or omitted to do anything which amounted on her part to a failure to exercise ordinary care, and you further find that such failure on her part to exercise ordinary care contributed to produce

the injury of which she complains, the plaintiff would not be entitled to recover, and you will find for defendant.

I further charge you in this case that if the plaintiff knew, or by the exercise of ordinary care might have known, that the train was likley to move before she got across it, and that, notwithstanding that knowledge on her part, she attempted to cross the train and was thereby injured, then she could not recover, for it would be upon her part a failure to exercise ordinary care for her own safety.

I further charge you that if the plaintif heard a warning or warnings that the train was about to be started, and notwithstanding her hearing these warnings, she went upon the train and was thereafter thrown to the ground and injured, she can not recover. That is to say, in this case, if the plaintiff heard the conductor give the warning that the train was about to move, or if she heard the engineer by ringing the bell give the signal that the train was about to move, and notwithstanding her knowledge that such warning or signal had been given, attempted to cross the train knowing that the warning or signal was likely to be followed by the train being put in motion, she would not be entitled to recover, and if you find the facts so to be, it would be your duty to find for defendant.

I further charge you that if before the plaintiff went upon the Texarkana train the engine bell was rung and the conductor of the train announced "all aboard" in the usual and customary way, then the plaintiff can not recover in this case, even though you find from the testimony that from inadvertence or inattention she failed to hear the ringing of the bell or failed to hear the announcement of the conductor signifying that the train was about to be set in motion.

(In this case the Court has admitted in evidence before you the custom of the people of Marshall of crossing the vestibules of the Texarkana train for the purpose of going to and returning from the New Orleans train to the depot of the defendant company and various homes and places of business in Marshall. The Court informs you that you may

consider this testimony as to the custom prevailing in Marshall in reference to crossing the vestibules of the Texarkana train in determining whether it was negligence on the part of the operatives of the Texarkana train in starting the train at the time plaintiff was injured—that is, whether the operatives of the Texarkana train knew or by the exercise of ordinary care might have discovered that plaintiff or some one else might attempt to cross the train at that time and place, and that the starting of the train would place them in danger. All the testimony in reference to the custom may be considered by you as bearing on the question of whether the operatives in charge of the train were guilty of negligence in starting the train at the time Miss Marcus boarded it.)

(I further instruct the jury that the evidence that the vestibules of the Texarkana train were left open, and that had been the custom that had prevailed at Marshall, and that people had been crossing the Texarkana train in going to the New Orleans train and returning to the station and to their homes may be considered by you in passing upon the question of whether the plaintiff, Miss Marcus, was guilty of contributory negligence in attempting to cross the train through the vestibules at the time she fell from it and was injured, it being a question in the case as to whether in making the attempt to cross the Texarkana train she was guilty of contributory negligence, and the court has admitted the testimony that it was the custom to leave the vestibules open so that the jury might consider it in determining whether the plaintiff was guilty of contributory negligence in attempting to cross the vestibule.)

In case the jury find for the plaintiff, the next question for your consideration will be the measure of damages. There are some things which the jury ought not to consider, and some things which the jury ought to consider in determining the measure of damages. It would not be proper to be controlled or influenced in any degree in reaching a verdict, should you find for plaintiff, by passion or sympathy. The proper rule to govern the jury is to ascertain what

amount would be a fair and reasonable compensation for the injury the plaintiff has received as the result of the negligence of the defendant, in case you find the defendant guilty of negligence. In reaching this amount, it is proper for the jury to take into consideration any loss of time which the plaintiff has been occasioned through the injury which has been proven before you. It is proper to take into consideration any physical or mental suffering she has endured, any diminution in her capacity to labor and earn money, and doctor's bills or nurse hire or drug bills which you find from the testimony have been paid by her or for which she is liable. You may also consider any deformity or impairment of her powers of locomotion which you believe from the testimony was the result of the negligence of the defendant. You may take into consideration the nature, character and extent of the injuries and whether temporary or permanent, and from all the facts and circumstances in evidence determine what amount of cash money paid now at this time, and not strung out in various payments in the future, would be a fair and reasonable compensation for such injuries as you find from the testimony were the direct and proximate result of the negligence of the defendant company, and make that sum the amount of your finding.

If you find for the plaintiff, the form of your verdict may be "We, the jury, find for the plaintiff, and assess her damages at ..... Dollars," filling in the blank with the amount you find.

If you find for the defendant, the form of your verdict may be "We, the jury, find for the defendant." Let your verdict be dated and signed by a foreman selected from your body.

You are the exclusive judges of the facts of the case and of the credibility of the witnesses. As to the law, it is your duty to be governed by the instructions delivered by the Court.

MR. JONES: The Court did not charge that the burden of proof of contributory negligence was on the defendant, and almost charged it was on the plaintiff.

If the defendant was negligent either as to the vestibule being open, as to the warning or in the handling of the train, the plaintiff would be entitled to recover for that negligence, if it caused the injury. The Court made the plaintiff's right to recover depend on it being guilty of negligence in the three respects.

MR. PRENDERGAST: We except to that part of the charge in which the court said it was the duty of the defendant to look out for the plaintiff, if they knew or by the exercise of ordinary care could have known that she was in the act of crossing over. The error consists in making us liable if by the exercise of ordinary care we could have known it. That is repeated three times in the charge.

We except to the Court telling the jury that they may consider the custom of the public in crossing in determining the plaintiff's care or want of care.

We also except to telling the jury that they may consider the fact that the vestibules were left open in passing upon the question as to whether plaintiff was guilty of contributory negligence.

MR. YOUNG: The defendant further excepts to the part of the charge submitting the question of negligence to the jury to the effect that if they knew or by the exercise of ordinary care could have known that she was about to cross, because we say there was no notice given of her intention to cross.

We except to the charge as to a sudden jerk of the train because the undisputed evidence shows that the engineer did not know anything about the people being back there. In view of the argument of plaintiff's counsel about the porter, we request the Court to supplement the charge on that and instruct the jury that there is no evidence that the porter was about the place of crossing. With reference to the instruction about negligence, we think the jury should the instruction about negligence, we think the juyr should such an act as would constitute negligence towards the plaintiff and no one else.

MR. PRENDERGAST: We except to the refusal to give the special charges asked by us.

THE COURT: Gentlemen, my attention has been called to one matter that possibly may be made a little clearer by this additional instruction to you, and that is that where contributory negligence is plead by the defendant, the burden is upon the defendant to establish the existence of the contributory negligence, unless it appears from the development of the plaintiff's own case. I mean to say that where the plaintiff has established a case that would entitle her to recover, and the defendant relies upon the defense of contributory negligence, the burden is upon the defendant to establish contributory negligence, but at the same time the further instruction must be observed that if upon the whole case established by both sides you find that the plaintiff was guilty of contributory negligence—that is, a failure to exercise ordinary care for her own safety, which contributed to produce her injury, she can not recover. If contributory negligence does not arise out of the plaintiff's own case, the burden of establishing contributory negligence rests with the defendant.

MR. JONES: The Court said to the jury in effect that if the signal was given, and the plaintiff did not hear it, she would not be entitled to recover, and I want to except to that.

ADDITIONAL INSTRUCTIONS AT REQUEST OF THE JURY.

Gentlemen of the Jury:

In answer to your request that I give you further instructions on the subject of contributory negligence, I desire to say that I do not know of any additional instructions on that subject which under the facts of the case it would be proper to give, but I take it that the request of the jury means for me to give some explanatory instructions with reference to the law already given you in charge. I will try to briefly summarize the law as the Court understands it to be on that phase of the case.

To begin with, the plaintiff in the case has the burden of proving by a preponderance of the evidence that the injury of which she complains was the result of some negligence upon the part of the defendant's agents in charge of its Texarkana train. In her petition she sets out the acts which she alleges caused the injury. Now the burden is upon her to show by a preponderance of the evidence that the operatives of the train did or omitted to do some act alleged in her petition which caused the injury, and to show that those acts upon the part of the operatives were negligence as I have defined that term—that is, that those acts upon the part of the operatives of the train were a failure upon their part to exercise that degree of care which a person of ordinary prudence would have exercised under the circumstances of the situation. Where the plaintiff has shown by a preponderance of the evidence that the acts she sets out in the petition as having caused the injury did cause the injury, and has shown by a preponderance of the evidence that those acts constituted negligence as defined, then she would be entitled to recover, unless the jury finds that she herself was guilty of contributory negligence. Though you might find that the defendant's operatives in charge of the train were guilty of negligence which caused the injury to the plaintiff, yet if you also find the plaintiff was guilty of some act of negligence which, concurring with the negligence of the defendant, contributed to produce her injury, she would not be entitled to recover. As to whether the operatives of the train were guilty of negligence is a question of fact for you to decide, and as to whether the plaintiff herself was guilty of some negligent act contributing to her injury is a question of fact for you to decide. In doing so, I give you this instruction: That though you might find that the plaintiff had done something or failed to do something which contributed to cause her injury, that of itself would not defeat her right to recover unless you find in addition to that that the act which you believe contributed to her injury was a failure to exercise that degree of care which a person of ordinary prudence would have exercised under

the circumstances of the situation, or that her failure to do something which she failed to do and which contributed to cause her injury was a failure to exercise that degree of care for her own safety which a person of ordinary prudence would have exercised under the circumstances of the situation. If you find that she committed an act either of omission or commission which showed a lack of ordinary care for her own saety which contributed to cause her injury, then it would be an act of contributory negligence which would defeat her right to recover, even though you find that the operatives of the train had also been guilty of negligence.

THE COURT: Counsel for defendant have requested me to give you a charge which is the law, but which I really think the jury understands from the instructions already delivered by the Court. I tell you also that it is the law of the case that if the plaintiff was guilty of some negligence which contributed to her injury, and you should find that to be a fact, it will not be necessary for you to find whether the defendant company was guilty of negligence or not. If the plaintiff was guilty of contributory negligence, it would be immaterial whether defendant was guilty of negligence or not.

THE COURT: As suggested by counsel for plaintiff, I instruct you that the same definitions and requirements would be necessary to constitute negligence on the part of the plaintiff obtain as necessary to constitute negligence on the part of defendant. She must have done some act or omitted to do some act which would be negligence—that is, some act which a person of ordinary prudence would not have done, or the failure to do some act which a person of ordinary prudence would have done.

Thereupon the Texas & Pacific Railway Company requested the Court to give the following special charges, each of which charges were refused by the Court and the Texas & Pacific Railway Company, then and there excepted to the Courts refusal to give each one of said charges, said charges being as follows:

111.

1.

The Jury are charged:

In this case it can not be held to be an act of negligence for the Railway Company to have left the doors to the vestibule on the cars open at the time plaintiff and her companions attempted to cross over the car.

2.

The Jury are charged:

The plaintiff at the time she was injured did not stand in such relation to the Railroad Company as that she was entitled to receive notice of the intention to start the train. Therefore unless the person who gave the signal for the train to start knew when he gave the signal that plaintiff was in the act of getting off the train and liable to be injured by the starting of the train, plaintiff can not recover.

3.

The Jury are charged:

There is no evidence that the conductor who gave the signal for the train to start knew that plaintiff was in a position that the starting of the train would likely cause injury to her. Therefore you can not find for plaintiff on the ground that the conductor was negligent in starting the train when he did.

4.

The Jury are charged:

The fact that numerous persons had at various times crossed over the train as plaintiff attempted to do would not make it the duty of persons in charge of the train to examine and see if any person was crossing over before he gave the signal to put the train in motion.

5.

The Jury are charged:

It appears from the evidence that plaitniff was not induced to cross over the train by the fact that other persons at other times had crossed over it, therefore the fact that other persons at other times had crossed over, can not be

considered by you as evidence of defendant's liability in this case.

6.

The Jury are charged:

In this case there is no proof that it was the duty of the Railway Company to have prevented the plaintiff from crossing over the vestibule of the car at the time she did so, and you can not find a verdict for plaintif based on the fact that the Railway Company did not prevent her from crossing.

7.

The Jury are charged:

There is no evidence that the vestibule doors on the train were left open for any persons except passengers getting on the train or going to the Shreveport train to become passengers thereon. And the plaintiff was not in a position to demand the right to use the vestibules.

8.

The Jury are charged:

The plaintiff had no right to demand the use of the vestibules on the cars.

When she desired to use them it was her duty to notify the persons in charge of the train, that she desired to use them, if she desired the men in charge of the train to look out for her safety while crossing.

9.

The Jury are charged:

You are charged to return a verdict for the defendant.

10.

The Jury are charged:

You are charged that if you find from the evidence that Conductor Fowler called "all aboard" before the train started, and in the usual manner and usual voice it was called by him, and in the usual time before starting his train, you will find for the defendant.

11.

The Jury are charged:

You are charged that people crossing the platform of the cars by going from the south side of them to the north side would not be notice to the defendant's conductor that people would cross the platforms of the said cars by going from the north side of them to the south side of them, therefore if you fail to find that a sufficient number of ladies prior to October 15, 1911, crossed from the north side of the train to the south side thereof by going over the platforms of the cars to cause a person of ordinary care situated as Conductor Fowler was, to reasonably contemplate or foresee that some lady or ladies might undertake to cross the platforms of the cars as the train was due to leave, there would be no duty on the part of Conductor Fowler to give notice to the plaintiff or any of her party that the train was going to move.

12.

The Jury are charged:

You are instructed that the fact that the plaintiff received an injury at the hands of the defendant company would not, of itself, entitle her to a recovery, but before she can recover it is her duty to prove by a preponderance of the evidence that her injury was the direct and proximate result of some negligence on the part of the conductor or engineer of the train she fell or jumped from and received her injury, and if you fail to so find, you will return a verdict for the defendant. And you are further instructed in this connection that an act committed by either of them or an act omitted by either of them would not be negligence unless you find that a person of ordinary care, under the same circumstances, could reasonably have anticipated or foreseen that such an act committed, or such an act omitted, might result in injury to some one, and if you fail to so find, you will return a verdict for the defendant.

13.

The Jury are charged:

You are charged that it could not be negligence for the

engineer to start the train with a jerk unless you find from the evidence that a person of ordinary care situated as he was could reasonably have contemplated or understood that the plaintiff or some other lady might be passing over the platform of one of the cars of the train, and if you fail to so find, you will consider that the engineer was not guilty of any negligence in starting the train with a jerk; if you find that he did start it with a jerk.

14.

The Jury are charged:

You are instructed that if you find from the evidence that the conductor called "all aboard" before he gave the engineer the signal to start the train, and that he so called in the usual tone of voice, or if you find that the engineer rang the bell or started it to ringing before he started the train to moving, you will find for the defendant.

15.

The Jury are charged:

You are charged that if you find from the evidence that men crossed from the north side of the cars to the south side by going over the platforms, and that they did so to the extent that they made it a custom, this would not make it the duty of the operatives of the train to watch out for or warn ladies that the trian was going to move, and before you can find that it was the duty of operatives of the train to look out for or warn the plaintiff that the train was going to move you must find by a preponderance of the evidence that ladies had been in the practice of crossing from the north side of passenger train No. 2 to the south side thereof by crossing over the platforms of the cars to such an extent that it became a custom, and that a person of ordinary care, situated as the conductor of that train was on that date, could reasonably have understood that some lady might be crossing over the platform of a car from the north side of the train to the south side thereof, and if you fail to so find you will find for the defendant, regardless of whatever else you may find.

16

The Jury are charged:

You are instructed that if you find from the evidence that either A. Marcus or the plaintiff, before starting over the platform of the car, knew that the train was likely to move at any time, and knew the dangers of being on the platform of the car when the train would move or that either one of them in the exercise of ordinary care for the safety of the plaintiff, must necessarily have known that the train was likely to move at any time, and the dangers arising therefrom, you will find for the defendant, regardless of whether any warning was given that the train was going to move or not.

17.

The Jury are charged:

You are instructed that if you find from the evidence that the plaintiff, before starting to cross over the platform of the car, knew that the train was likely to move at any time, and knew the dangers of being on the platform of the car when it moved, or that, in the exercise of ordinary care for her own saefty, she must necessarily have known that the train was likely to move at any time, and the dangers arising from being on the platform of the car when it moved, you will find for the defendant, whether you find that there was any warning given that the train would be moved or not.

18.

The Jury are charged:

You are instructed that if the conductor did not give notice that the train was going to move, or that the engineer did not ring the bell, of the engine, it would not be negligence, because there is no evidence that either the conductor or engineer knew that the plaintiff was in the act of crossing the platform of the car.

19.

The Jury are charged:

You are instructed that if the engineer did start the train

with a jerk or jar at the time in question, it would not be negligence, because there is no evidence that the engineer knew or had reason to believe that the plaintiff was in the act of crossing the platform of the car.

20.

The Jury are charged:

You are charged that if you find from the evidence that when the plaintiff attempted to cross over the train she knew or had reason to know that the train might start at any time you will find for the defendant.

21.

The Jury are charged:

You are instructed that before you can find for the plaintiff in this case you must find by a preponderance of the evidence the following:

1st. That the defendant company, through the conductors of its passenger trains, had allowed the custom to be established at its station at Marshall, Texas, for persons to cross through the vestibules of its passenger cars from the north side of the main track at said place to the south side thereof, and that such custom was in force on and prior to October 15, 1911.

2nd. That on and prior to said date it was customary for ladies to cross over passenger trains on the defendant's main track at Marshall, Texas, from the north side thereof to the south side of the same, and that they crossed over by going through the vestibules of the coaches.

3rd. That the conductors of the defendant's passenger trains knew of these customs, if there were such customs, and that the deendant's Conductor Fowler, knew of such customs, if any.

4th. That the defendant's conductors in charge of its passenger trains consented or acquiesced in persons and ladies crossing through the vestibules of passenger trains on the main track of its depot at Marshall.

5th. That Conductor Fowler, did not call "all aboard"

on the night of the injury to the plaintiff before he started the train.

7th. That the whistle of the engine was not blown, nor the bell thereof rung before the train started.

8th. That the failure, if any, on the part of Conductor Fowler to call "all aboard" was negligence, or that the failure, if any, of the operatives of the engine to blow the whistle or ring the bell was negligence.

9th. That the negligence, if any, of Conductor Fowler, or the negligence, if any, of the operatives of the engine, in not calling "all aboard" or in not ringing the bell or blowing the whistle of the engine if you find that none of these warnings were given, was the proximate cause of the plaintiff's injury.

If you fail to find any one of the foregoing issues in favor of the plaintiff you will find for the defendant, and you will also find for the defendant if you find either of the following facts:

1st. If you find that the plaintiff, in crossing over the platform of the car at the place and under the circumstances she did, did something that a person of ordinary care and prudence would not have done under the same circumstances, you will find for the defendant, regardless of whether or not you find that any signals were given that the train was going to move, and regardless of whether you find or not that the defendant or any of its agents were guilty of any negligence.

2nd. If you find that A. Marcus, the father of the plaintiff, in causing the plaintiff to cross over the platform of the car, did something that a person of ordinary care and prudence would not have done under the same circumstances, you will find for the defendant, because the negligence of A. Marcus, if any, under the circumstances would be chargeable to the plaintiff.

Thereupon the jury retired and after consideration returned into Court a verdict in favor of the plaintiff, for $6000.00, and the Court entered judgment accordingly.

Upon the defendant's application, the Court entered an

order granting the defendant forty-two days time to prepare and present its petition for a new trial and stayed execution until that time.

The Court also ordered the cause retained for the purpose of permitting the party to prepare and present bills of exception for a writ of error in the case, and by agreement of parties the time was extended to February 24, 1914.

The above this day approved as a Bill of Exceptions, the Court declines to allow motion for a new trial.

GORDON RUSSELL, Judge.

Filed in U.S. Dist Court Feb 14 1914

CLERK'S CERTIFICATE.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, AT JEFFERSON.

No.....

I, J. R. Blades, Clerk of the District Court of the United States for the Eastern District of Texas, at Jefferson, do hereby certify that the foregoing and attached papers of manuscript numbered in the margin of said pages (from 1 to 118 inclusive) contain a full, true and correct copy of the record, bill of exception, assignment of errors, and all the proceedings in the cause No. 592 wherein the Texas & Pacific Railway Company are plaintiffs in error and May Marcus is defendant, except that the original writ of error and citation in error are included therein, instead of copies thereof, as fully as the same remains on file and record in my office at Jefferson, Texas.

In testimony whereof I hereunto set my hand and affix the seal of the District Court of the United States of America, for the Eastern District of Texas, at Jefferson, at my office in said city of Jefferson, this the 25th day of March, A. D. 1914.

J. R. BLADES,
Clerk of the United States District Court, Eastern District of Texas, at Jefferson, Texas.
By W. E. SINGLETON, JR., Deputy.

That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of November 16th, 1914.

No. 2637.

TEXAS & PACIFIC RAILWAY COMPANY
versus
Miss MAY MARCUS.

On this day this cause was called, and, after argument by F. H. Prendergast, for plaintiff in error, and S. P. Jones, Esq., for defendant in error, was submitted to the Court.

Opinion of the Court.

Filed December 8th, 1914.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2637.

TEXAS AND PACIFIC RAILWAY COMPANY
v.
Miss MAY MARCUS.

Error to the District Court of the United States, Eastern District of Texas.

Before Pardee and Walker, Circuit Judges, and Call, District Judge.

By the COURT:

In this case we find no reversible error assigned or patent of record. Judgment

Affirmed.

Judgment.

Extract from the Minutes of December 8th, 1914.

No. 2637.

TEXAS & PACIFIC RAILWAY COMPANY
versus
Miss MAY MARCUS.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered and adjudged that the plaintiff in error, The Texas & Pacific Railway Company, and the sureties on the writ of error bond herein, J. H. Ardrey and E. R. Buddy, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of said District Court.

Petition for Writ of Error, Order Allowing Same, and Assignment of Errors.

Filed January 13th, 1915.

In the United States Circuit Court of Appeals, Fifth Circuit.

To the Honorable the Supreme Court of the United States:

Now comes the Texas — Pacific Railway Company and shows to this Court that in a cause wherein the Texas & Pacific Railway Company was plaintiff in error, and Miss May Marcus was defendant in error, the United States Circuit Court of Appeals for the Fifth Circuit, on the 8th day of December, 1914, affirmed a judgment in favor of Miss May Marcus against the Texas & Pacific Railway Company, for Six Thousand Dollars which had been rendered in the United States District Court for the Eastern District of Texas at Jefferson; and in the proceedings of said cause, and in the rendition of said judgment, manifest error hath happened to the great damage of the Texas & Pacific Railway Company, as follows:

First.

The Court erred in refusing to sustain the first assigned error, which is as follows:

"The Jury are charged:

In this case it cannot be held to be an act of negligence for the Railway Company to have left the doors to the vestibule open at the time plaintiff and her companions attempted to cross over the car."

Second.

The Court erred in refusing to sustain the second assigned error, which is as follows:

"The Jury are charged:

"The plaintiff at the time she was injured did not stand in such relation to the Railroad Company as that she was entitled to receive notice of the intention to start the train. Therefore unless the person who gave the signal for the train to start, knew when he gave the signal that plaintiff was in the act of getting on the train and liable to be injured by the starting of the train, plaintiff cannot recover."

Third.

The Court erred in refusing to sustain the Third assigned error, which is as follows:

"The Jury are charged:

"There is no evidence that the conductor who gave the signal for the train to start knew that plaintiff was in a position that the starting of the train would likely cause injury to her. Therefore you can not find for plaintiff on the ground that the conductor was negligent in starting the train when he did."

Fourth.

The Court erred in refusing to sustain the fourth assigned error, which is as follows:

"The Jury are charged:

"The fact that numerous persons had at various times crossed over the train as plaintiff attempted to do, would not make it the duty of persons in charge of the train to examine and see if any person was crossing over before he gave the signal to put the train in motion."

Fifth.

The Court erred in refusing to sustain the Fifth assigned error, which is as follows:

"The Jury are charged:

"It appears from the evidence that plaintiff was not induced to cross over the train by the fact that other persons at other times had crossed over it. Therefore, the fact that other persons at other times had crossed over, cannot be considered by you as evidence of defendant's liability in this case."

Sixth.

The Court erred in refusing to sustain the sixth assigned error, which is as follows:

"The Jury are charged:

"In this case there is no proof that it was the duty of the Railway Company to have prevented the plaintiff from crossing over the vestibule of the car at the time she did so, and you can not find a verdict for plaintiff based on the fact that the Railway Company did not prevent her from crossing."

Seventh.

The Court erred in refusing to sustain the seventh assigned error, which is as follows:

"The Jury are charged:

"There is no evidence that the vestibule doors on the train were left open for any persons except passengers getting on the train or going to the Shreveport train to become passengers thereon. And the plaintiff was not in a positon to demand the right to use the vestibules."

Eighth.

The Court erred in refusing to sustain the eighth assigned error, which is as follows:

"The Jury are charged:

"The plaintiff had no right to demand the use of the vestibules on the cars.

When she desired to use them it was her duty to notify the persons in charge of the train, that she desired to use them, if she desired the men in charge of the train to look out for her safety while crossing."

Ninth.

The Court erred in refusing to sustain the ninth assigned error, which is as follows:

"The Jury are charged:

"You are charged to return a verdict for the defendant."

Tenth.

The Court erred in refusing to sustain the tenth assigned error, which is as follows:

"The Jury are charged:

"You are charged that if you find from the evidence that Conductor Fowler called "all aboard" before the train started, and in the usual manner and usual voice it was called by him, and in the usual time before starting his train, you will find for the defendant."

Eleventh.

The Court erred in refusing to sustain the eleventh assigned error, which is as follows:

"The Jury are charged:

"You are charged that people crossing the platform of the cars by going from the south side of them to the north side would not be notice to the defendant's conductor that people would cross the platform of the said cars by going from the north side of them to the south side of them. Therefore, if you fail to find that a sufficient number of ladies, prior to October 15, 1911, crossed from the north side of the train to the south side thereof, by going over the platforms of the cars, to cause a person of ordinary care situated as Conductor Fowler was, to reasonably contemplate or foresee that some lady, or ladies, might undertake to cross the platforms of the cars as the train was due to leave, there would be no duty on the part of Conductor Fowler to give notice to the plaintiff or any of her party that the train was going to move."

Twelfth.

The Court erred in refusing to sustain the twelfth assigned error, which is as follows:

"The Jury are charged:

"You are instructed that the fact that the plaintiff received an

injury at the hands of the defendant company would not of itself entitle her to recovery, but before she can recover, it is her duty to prove by a preponderance of the evidence that her injury was the direct and proximate result of some negligence on the part of the conductor or engineer of the train she fell or jumped from and received her injury, and if you fail to so find, you will return a verdict for the defendant. And you are further instructed in this connection that an act committed by either of them or an act omitted by either of them would not be negligence unless you find that a person of ordinary care, under the same circumstances, could reasonably have anticipated or foreseen that such an act committed, or such an act omitted, might result in injury to some one, and if you fail to so find, you will return a verdict for the defendant.

Thirteenth.

The Court erred in refusing to sustain the thirteenth assigned error, which is as follows:

"The Jury are charged:

"You are charged that it could not be negligence for the engineer to start the train with a jerk unless you find from the evidence that — person of ordinary care, situated as he was, could reasonably have contemplated or understood that the plaintiff or some other lady might be passing over the platform of one of the cars of the train, and if you fail to so find, you will consider that the engineer was not guilty of any negligence in starting the train with a jerk—if you find that he did start it with a jerk."

Fourteenth.

The Court erred in refusing to sustain the fourteenth assigned error, which is as follows:

"The Jury are charged:

"You are instructed that if you find from the evidence that the conductor called "all aboard" before he gave the engineer the signal to start the train, and that he so called in the usual tone of voice, or if you find that the engineer rang the bell or started it to ringing before he started the train to moving, you will find for the defendant.

Fifteenth.

The Court erred in refusing to sustain the fifteenth assigned error, which is as follows:

"The Jury are charged:

"You are charged that if you find from the evidence that men crossed from the north side of the cars to the south side by going over the platforms, and that they did so to the extent that they made it a custom, this would not make it the duty of the operatives of the train to watch out for or warn ladies that the train was going to move, and before you can find that it was the duty of operatives of the train to look out for or warn the plaintiff that the train was going to move you must find by preponderance of the evidence that

ladies had been in the practice of crossing from the north side of passenger train No. 2 to the south side thereof by crossing over the platforms of the cars to such an extent that it became a custom and that a person of ordinary care, situated as the conductor of that train was on that date, could reasonably have understood that some lady might be crossing over the platform of a car from the north side of the train to the south side thereof, and if you fail to so find you will find for the defendant, regardless of whatever else you may find."

Sixteenth.

The Court erred in refusing to sustain the sixteenth assigned error, which is as follows:

"The Jury are charged:

"You are instructed that if you find from the evidence that either A. Marcus or the plaintiff, before starting over the platform of the car, knew that the train was likely to move at any time, and knew the dangers of being on the platform of the car when the train would move, or that either one of them, in the exercise of ordinary care for the safety of the plaintiff, must necessarily have known that the train was likely to move at any time, and the dangers arising therefrom you will find for the defendant, regardless of whether any warning was given that the train was going to move or not."

Seventeenth.

The Court erred in refusing to sustain the seventeenth assigned error, which is as follows:

"The Jury are charged:

"You are instructed that if you find from the evidence that the plaintiff, before starting to cross over the platform of the car, knew that the train was likely to move at any time, and knew the dangers of being on the platform of the car when it moved, or, that in the exercise of ordinary care for her own safety, she must necessarily have known that the train was likely to move at any time, and the dangers arising from being on the platform of the car when it moved, you will find for the defendant, whether you find that there was any warning given that the train would move or not."

Eighteenth.

The Court erred in refusing to sustain the eighteenth assigned error, which is as follows:

"The Jury are charged:

"You are instructed that if the conductor did not give notice that the train was going to move, or that the engineer did not ring the bell of the engine, it would not be negligence because there is no evidence that either the conductor or the engineer knew that plaintiff was in the act of crossing the platform of the car."

Nineteenth.

The Court erred in refusing to sustain the nineteenth assigned error, which is as follows:

"The Jury are charged:

"You are instructed that if the engineer did start the train with a jerk or jar at the time in question, it would not be negligence, because there is no question that the engineer knew or had reason to believe that the plaintiff was in the act of crossing the platform of the car.

Twentieth.

The Court erred in refusing to sustain the twentieth assigned error, which is as follows:

"The Jury are charged:

"You are charged that if you find from the evidence that when the plaintiff attempted to cross over the train she knew or had reason to know that the train might start at any time, you will find for the defendant."

Twenty-First.

The Court erred in refusing to sustain the twenty-first assigned error, which is as follows:

"The Jury are charged:

"You are instructed that before you can find for the plaintiff in this case you must find by a preponderance of the evidence the following:

1st. That the defendant company, through the conductors of its passenger trains, had allowed the custom to be established at its station at Marshall, Texas, for persons to cross through the vestibules of its passenger cars from the north side of the main track at said place, to the south side thereof, and that such custom was in force on and prior to October 15, 1911.

2nd. That on and prior to said date it was customary for ladies to cross over passenger trains on the defendant's main track at Marshall, Texas, from the north side thereof to the south side of the same, and that they crossed over by going through the vestibules of the coaches.

3rd. That the conductors of the defendant's passenger trains knew of these customs, if there were such customs, and that the defendant Conductor Fowler, knew of such customs, if any.

4th. That the defendant's conductors in charge of its passenger trains consented or acquiesced in persons and ladies crossing through the vestibules of passenger trains on the main track of its depot at Marshall.

5th. That Conductor Fowler did not call "all aboard" on the night of the injury to the plaintiff before he started the train.

7th. That the whistle of the engine was not blown, nor the bell thereof rung before the train started.

8th. That the failure, if any, on the part of Conductor Fowler to call "all aboard" was negligence, or that the failure, if any, of

the operatives of the engine to blow the whistle or ring the bell was negligence.

9th. That the negligence, if any of Conductor Fowler, or the negligence, if any, of the operatives of the engine, in not calling "all aboard," or in not ringing the bell or blowing the whistle of the engine, if you find that none of these warnings were given, was the proximate cause of the plaintiff's injury.

If you fail to find any one of the foregoing issues in favor of the plaintiff you will find for the defendant, and you will also find for the defendant if you find either of the following facts:

1st. If you find that the plaintiff, in crossing over the platform of the car at the place and under the circumstances she did, did something that a person of ordinary care and prudence would not have done under the same circumstances, you will find for the defendant, regardless of whether or not you find that any signals were given that the train was going to move, and regardless of whether you find or not that the defendant or any of its agents were guilty of any negligence.

2nd. If you find that A. Marcus, the father of the plaintiff, in causing the plaintiff to cross over the platform of the car, did something that a person of ordinary care and prudence would not have done under the same circumstances, you will find for the defendant, because the negligence of A. Marcus, if any, under the circumstances would be chargeable to the plaintiff."

Twenty-Second.

The Court erred in refusing to sustain the twenty-second assigned error, which is as follows:

"The Jury are charged:

"Applying the propositions I have announced to the facts in evidence before you, if you find from a preponderance of the testimony in this case that the plaintiff, Miss Marcus, on the occasion in question, was returning from the New Orleans train of the Texas & Pacific Railway Company to the station of that company, or to her home, in crossing the Texarkana train of the defendant company she was thrown to the ground and injured, as claimed; and if you further find from a preponderance of the evidence that the operatives in charge of the Texarkana train either knew that Miss Marcus was about to board the train for the purpose of crossing it, or if from all the circumstances before you you believe that by the exercise of ordinary care they could have discovered that she or some one else might be reasonably expected to attempt to cross the Texarkana train at that time and place: and if you further find from the preponderance of the evidence before you that the operatives in charge of the Texarkana train failed to close the vestibule door and started the train without giving any signal or warning that they expected to set it in motion, and if you further find from a preponderance of the evidence that the train started, Miss Marcus being upon the train under those circumstances, by a sudden jerk or jar and she was thrown to the ground and injured, and you further find from all the evidence before you that the acts of failing to

close the vestibule doors and failing to give proper signals that the train was about to be set in motion, and starting the train with a sudden jerk or jar, taken individually or collectively, amounted upon the part of the operatives in charge of the Texarkana train to a failure to exercise ordinary care, that is such care as a person of ordinary prudence would have exercised under similar circumstances, and that this failure was the direct and proximate cause of her being thrown to the ground and injured, then plaintiff would be entitled to recover."

This charge was error because there was no evidence that the persons operating the train knew that plaintiff was about to board the train for the purpose of crossing it.

2nd. It is further error because the evidence did not show that by ordinary care those persons in charge of the train could have discovered that the plaintiff might be reasonably expected to attempt to cross the Texarkana train at that time and place.

3rd. It is error because it was not the duty of the operatives of the train to do anything to ascertain whether the people were attempting to cross his train from the opposite side in the absence of something to show that he had reason to expect the persons would be crossing.

4th. It was error to submit the question of the sudden jerk or jar of a train, because there was no evidence to justify the jury in concluding that the jar or jerk of the train was sufficient under the circumstances of this case to constitute negligence."

Twenty-third.

The Court erred in refusing to sustain the twenty-third assigned error, which is as follows:

The Jury are charged

"In this case the court had admitted in evidence before you the custom of the people of Marshall of crossing the vestibules of the Texarkana train for the purpose of going to and returning from the New Orleans train to the depot of the defendant company, and various homes and places of business of Marshall. The Court informs you that you may consider this testimony as to the custom prevailing in Marshall in reference to crossing the vestibules of the Texarkana train in determining whether it was negligence on the part of the operatives of the Texarkana train in starting the train at the time plaintiff was injured, that is, whether the operatives of the Texarkana train knew, or, by the exercise of ordinary care, might have discovered, that plaintiff or some one else might attempt to cross the train at that time and place, and that the starting of the train would place them in danger. All the testimony in reference to the custom may be considered by you as bearing on the question of whether the operatives in charge of the train were guilty in starting the train at the time Miss Marcus boarded it."

This was error because there was not any evidence that the plaintiff knew of this custom of people crossing the train as she did, or that she relied on said custom when she attempted to cross the train,

and the consideration of the custom of other people crossing the train in that way would not aid the jury in determining whether the defendant company was negligent with reference to the plaintiff."

Twenty-fourth.

The Court erred in refusing to sustain the twenty-fourth assigned error, which is as follows:

"The Jury are charged:

"I further instruct the Jury that the evidence that the vestibules of the Texarkana train were left open, and that had been the custom that had prevailed at Marshall, and that people had been crossing the Texarkana train in going to the New Orleans train and returning to the station and to their homes, may be considered by you in passing upon the question of whether the plaintiff, Miss Marcus, was guilty of contributory negligence in attempting to cross the train through the vestibules at the time she fell from it and was injured, it being a question in the case as to whether in making the attempt to cross the Texarkana train she was guilty of contributory negligence, and the Court has admitted the testimony that it was the custom to leave the vestibules open so that the jury might consider it in determining whether the plaintiff was guilty of contributory negligence in attempting to cross the vestibule."

This was error because the fact that the doors of the vestibules were left open could not properly be considered by the Jury as determining whether the plaintiff was guilty of negligence of not, because the evidence shows that it was proper to leave the vestibules open in order that the people might leave the Texarkana train, and there could not be any impropriety charged against the Railroad Company for leaving the vestibules open, and there is no claim that said vestibules were left open as an invitation to the people situated as plaintiff was situated to cross over the Texarkana train in coming from the New Orleans train.

Wherefore the Texas & Pacific Railway Company prays for a writ of error directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding them to send up the Record in this certain cause that said error may be corrected, and prays the Court to fix the amount of supersedeas bond at Five Thousand dollars, and that the judgment be reversed.

(Signed) F. H. PRENDERGAST,
Attorney for Plaintiff in Error The Texas & Pacific Ry. Co.

Allowed Jan'y 13, 1915.

(Signed) DON A. PARDEE,
Circuit Judge.

Bond on Writ of Error.

Filed January 13th, 1915.

In the United States Circuit Court of Appeals for the Fifth Circuit.

THE TEXAS & PACIFIC RAILWAY CO., Plaintiff in Error,
vs.
Miss MAY MARCUS, Defendant in Error.

Know all men by these presents, That we, The Texas & Pacific Railway Company, a corporation duly incorporated and organized under and by virtue of an Act of Congress of the United States, as Principal, and J. H. Ardry and E. R. Buddy as sureties, are held and firmly bound unto Miss May Marcus, in the sum of Five Thousand Dollars, to be paid to the said Miss May Marcus, her executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, using scrolls for seals, and signed with our names, this the 13th day of January, 1915.

The condition of the foregoing bond is such that, whereas, lately at a term of the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, in a suit pending in said Court between The Texas & Pacific Railway Company, plaintiff in error, and Miss May Marcus, defendant in error, a judgment was rendered on the 8th day of December, 1914, affirming a judgment rendered in said cause on the 6th day of October, 1913, for the sum of Six Thousand Dollars with 6% interest thereon from date of judgment.

And whereas, the said Texas & Pacific Railway Company has obtained a writ of error and has filed a copy thereof in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, to reverse said judgment, and has also obtained a citation directed to the said Miss May Marcus and her attorney of Record, S. P. Jones, citing and admonishing her to appear in the Supreme Court of the United States in the city of Washington, District of Columbia, within thirty days from the date thereof.

Now if the said Texas & Pacific Railway Company shall prosecute its writ of error to effect, and answer all damages and costs, if it fail to make good its plea, then the above obligation to be void, otherwise to remain in full force and virtue.

Witness our hands this 7th day of January, 1915.

(Signed) THE TEXAS AND PACIFIC RAILWAY COMPANY,
By GEORGE THOMPSON,
Its Attorney.

J. H. ARDREY.
E. R. BUDDY.

Approved Jan'y 13, 1915.
(Signed) DON A. PARDEE,
Circuit Judge.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 119 to 135 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 2637, wherein Texas & Pacific Railway Company is plaintiff in error, and Miss May Marcus is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 118 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 16th day of January, A. D. 1915.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

UNITED STATES OF AMERICA,
Fifth Judicial Circuit, ss:

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals, Fifth Circuit:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Court, before you, or some of you, between The Texas and Pacific Railway Company, plaintiff in error, and Miss May Marcus, defendant in error, a manifest error hath happened, to the great damage of the said Texas and Pacific Railway Company, plaintiff in error as by its complaint appears; said judgment rendered on December Eighth, A. D. 1914, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at Washington, in said circuit, in not exceeding thirty days from the 13 day of January, 1915, the date of issuance of the citation herein, in the said United States Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Supreme Court may cause further

to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 13th day of January, in the year of our Lord one thousand nine hundred and Fifteen.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

Allowed by
DON A. PARDEE,
United States Circuit Judge.

I hereby certify that a true copy of the within writ has this day been lodged in the Clerk's office for the use of the defendant in error.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Dated this 13 day of January, 1915.

[Endorsed:] No. 2697. In the United States Circuit Court of Appeals, Fifth Circuit. The Texas & Pacific Railway Co., Plaintiff in Error, versus Miss May Marcus, Defendant in Error. Writ of Error. U. S. Circuit Court of Appeals. Filed Jan. 13, 1915. Frank H. Mortimer, Clerk.

UNITED STATES OF AMERICA,
Fifth Judicial Circuit, ss:

The President of the United States to Miss May Marcus or S. F. Jones, her attorney, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court, to be held at the City of Washington, within thirty days from the date of this writ, pursuant to a Writ of Error filed in the Clerk's office of the Circuit Court of Appeals of Fifth Circuit, wherein the Texas and Pacific Railway Company is plaintiff in error and Miss May Marcus is defendant in error, to show cause, if any there be, why the judgment rendered against said Texas and Pacific Railway Company, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 13th day of January, A. D. 1915, and of the independence of the United States the one hundred and 39th year.

DON A. PARDEE,
United States Circuit Judge.

I accept service of the within Citation in Error on this —— —, 191–.

S. P. JONES,
Attorney for May Marcus, Defendant in Error.

Citation filed —— —, —.

—— ——, *Clerk.*
By —— ——, *Deputy.*

[Endorsed:] No. 2637. In the United States Circuit Court of Appeals, Fifth Circuit. The Texas & Pacific Railway Company, Plaintiff in Error, versus Miss May Marcus, Defendant in Error. Citation and acceptance of service. U. S. Circuit Court of Appeals. Filed Jan. 13, 1915. Frank H. Mortimer, Clerk.

Endorsed on cover: File No. 24,534. U. S. Circuit Court Appeals 5th Circuit. Term No. 790. The Texas & Pacific Railway Company, plaintiff in error, vs. Miss May Marcus. Filed January 26th 1915. File No. 24,534.

FILED
FEB 26 1915
JAMES D. MAHER
CLERK

No. 790

IN THE UNITED STATES SUPREME COURT

TEXAS & PACIFIC RAILWAY CO.,
Plaintiff in Error.

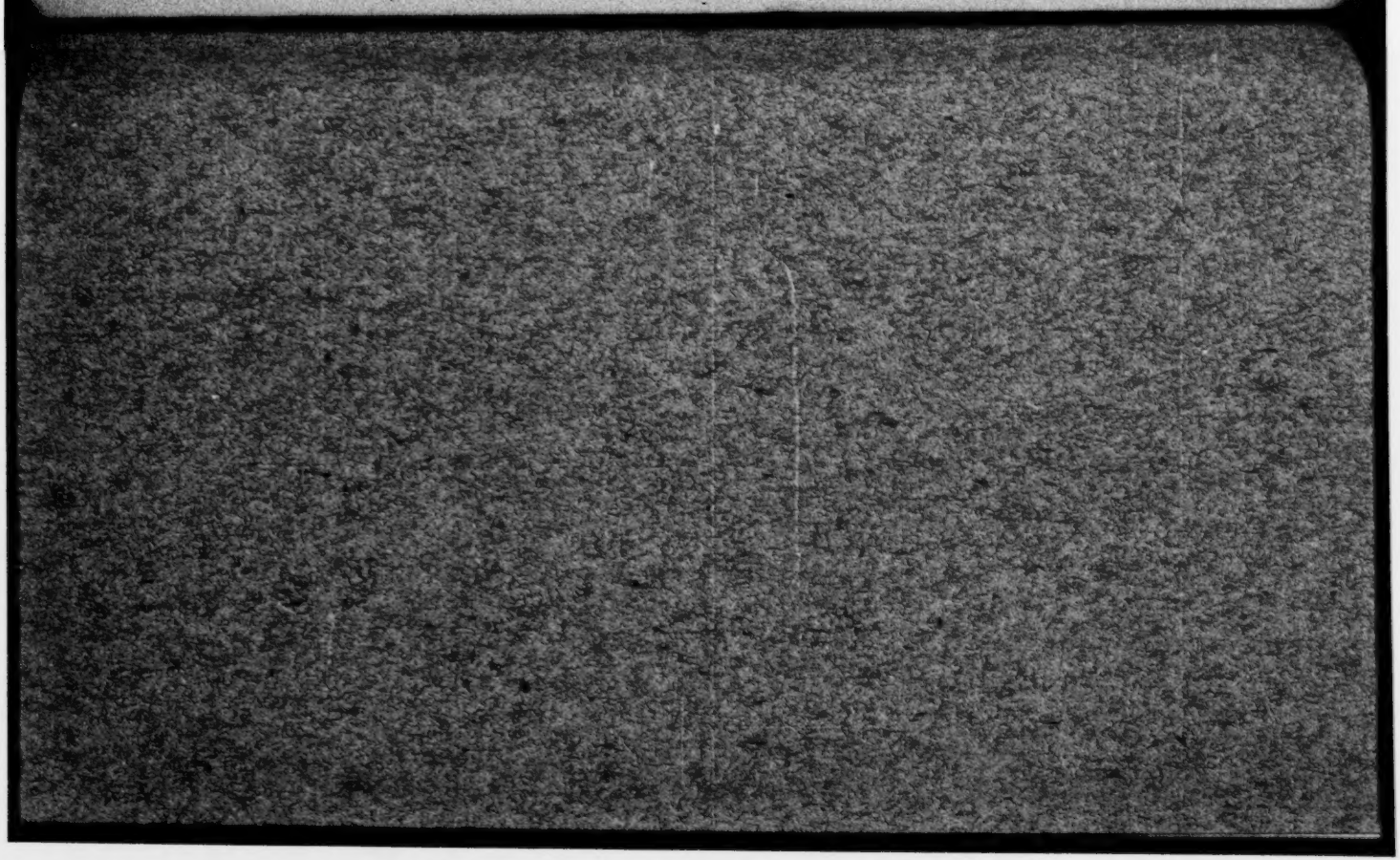
vs.

MISS MAY MARCUS,
Defendant in Error.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

By F. H. PRENDERGAST, Attorney,
Marshall, Texas.



THE TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

vs.

MAY MARCUS,
Defendant in Error.

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First.

The mere fact that the train started with a jerk when it backed out of a station, would not be negligence unless the jerk was unusual.

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Second.

After a passenger train has remained at a station the usual length of time, the conductor does not have to examine to see if persons not passengers, and not intending to become such, are climbing on or off the train.

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Third.

Where a train headed east opened the vestibules on the north side to allow passengers to leave the car on that side and go to another train waiting on that side, then it is not negligence to allow the vestibules to remain open until the incoming train starts to back out.

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No. 790

IN THE UNITED STATES SUPREME COURT

TEXAS & PACIFIC RAILWAY CO.,
Plaintiff in Error.

vs.

MISS MAY MARCUS,
Defendant in Error.

RIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

By F. H. PRENDERGAST, Attorney,
Marshall, Texas.

In this case, Plaintiff, Miss May Marcus, sued the Texas Pacific Railway Company, and recovered judgment in the um of $6,000.00. The Railway Company sued out a writ of rror from the United States Circuit Court of Appeals for

the Fifth Circuit where the judgment was affirmed in January 1915, no written opinion.

The Defendant in Error has moved to "dismiss or affirm," without reference to the merits because of questions raised are so frivolous as not to require further examination. He couples with that motion, a motion to place the cause on the summary docket, but we contend that the questions involved are not frivolous, and cause should be set down for full argument on the merits of the case.

This is another case which is covered by the rule announced in the case of Texas & Pacific Railway vs. Rosborough (235 U. S. 429). That is a case in which the Supreme Court will go no further than examine to see if plain error has intervened in the proceedings. The Court does not point out the difference between ordinary error and plain error, and we are not able to see any distinction except that plain error may perhaps be observed without any mental effort, or at least, with less mental effort than ordinary errors might be discovered.

It occurs to us that the rule established amounts to a rule of presumption that the court below has correctly ruled on the law of the case. It occurs to us that the law granting us a right to writ of error presupposes that the law has not been correctly ruled in the court below. It has been long the established practice that the Apellate Court would presume that the court below correctly ruled on the facts of a case, but that rule has never applied where the question was to the sufficiency of the evidence to establish some independent given fact. For instance, if the evidence failed to establish the plaintiff's cause of action, giving to the evidence all reasonable intendment in favor of the plaintiff, then the Appellate Court would so rule and would not dispose of the case by presuming that the court below ruled correctly. We appreciate the rule that in actions at law we can only raise on appeal questions of law properly arising in the case. The statute recognizing the right of appeal from the decision of the Circuit Court of Appeals to this court,

does not make any such limitations on the authority and duty of this Court as is implied in the Rosborough case. That is, assuming that we understand what is meant by the Rosborough case, we submit the following brief of the points relied on by us to reverse the judgment, hoping that this Court will set the cause down for further argument at some future time, and that if we convince this Court that error has been committed and that injustice has probably been done, that the Court will hold that the error is plain after it has been pointed out, and reverse the judgment.

I am not sure whether the expression "plain error" means that it may be seen by casual observation, or that it means important or gross error, such as the Court can readily see caused injustice to the complaining party.

She received her injuries under the following circumstances: Mrs. Henry Winters, who resides in Shreveport, had been visiting in Marshall and went to the depot to take the eastbound train for Shreveport, and quite a party of her relatives accompanned her to the depot: Mr. M. L. Weisman, her father; her sister, Mrs. Sam Wolff; her uncle, A. Marcus and his two daughters, Adrian and May Marcus; and Louis Kariel, her cousin. At the depot in Marshall at that time the depot building was situated on the south side of the railroad tracks. The railroad tracks ran east and west in front of the depot. On the extreme northern track was situated the passenger train which Mrs. Winters was to take going to Shreveport. That train is made up and starts from Marshall, but it awaits the arrival of the other train from the west coming into Marshall, which other train goes north from Marshall to Texarkana. This party went down to the depot before the arrival of the train from the west, and went over to the Shreveport train in company with Mrs. Winters and her two small children. The train coming from the west was behind time and it was after dark before it arrived. While the people were over at the Shreveport train, the train coming from the west had headed in on a track between the Shreveport train and the depot.

(A sketch on page 96 of the record shows the situation). While the train from the west was standing on the track next the depot the party, having bid goodbye to Mrs. Winters, started to return to the southside of the railroad, and finding the train from the west occupying the track next the depot, the party started to go around the west end of this train, but one of the party observed that the vestibules were open so they concluded to climb over the intervening train instead of going around it. These persons began to climb over the vestibule; Mr. A. Marcus was ahead in crossing that train which is called the Texarkana train; he had gotten off before the train started and helped his youngest daughter, Adrian, off and was standing there to help the others off, when just as his daughter May was on the steps just about to alight, the train gave a jerk and started to move out backward when she was about ready to step off the car, which caused May Marcus to fall and receive the injury. The party crossing over did not hear any signal, if any was given. Negligence relied on by the plaintiff was that the vestibules of the train were left open as an implied invitation for people to cross over that train who desired to go to or from the Shreveport train, and that no notice was given of the intention to start the Texarkana train in backward motion at the time it did start. The defendant contends that none of the persons operating the train knew that the plaintiff was crossing over the train at the time it started in backward motion, and that they had no reason to expect she would be there; that she was not boarding this train as a passenger, but for her own personal convenience. Several objections were made to the charge given by the Court and several requested charges refused, which formed the basis of our assignments of error, which are as follows:

Requested charges each request and exception taken:

1

"In this case it can not be held to be an act of negligence for the Railway Company to have left the doors to the vestibule on the cars open at the

time plaintiff and her companions attempted to cross over the car."

2

"The plaintiff at the time she was injured did not stand in such relation to the Railroad Company as that she was entitled to receive notice of the intention to start the train. Therefore unless the person who gave the signal for the train to start, knew when he gave the signal that plaintiff was in the act of getting off the train and liable to be injured by the starting of the train, plaintiff can not recover."

3.

"There is no evidence that the conductor who gave the signal for the train to start knew that plaintiff was in a position that the starting of the train would likely cause injury to her. Therefore you can not find for plaintiff on the ground that the conductor was negligent in starting the train when he did."

4

"The fact that numerous persons had at various times crossed over the train as plaintiff attempted to do would not make it the duty of persons in charge of the train to examine and see if any person was crossing over before he gave the signal to put the train in motion."

5

"It appears from the evidence that plaintiff was not induced to cross over the train by the fact that other persons at other times had crossed over it. Therefore the fact that other persons at other times had crossed over, can not be considered by you as evidence of defendant's liability in this case."

6

"In this case there is no proof that it was the

duty of the Railway Company to have prevented the plaintiff from crossing over the vestibule of the car at the time she did so, and you can not find a verdict for plaintiff based on the fact that the Railway Company did not prevent her from crossing."

7

"There is no evidence that the vestibule doors on the train were left open for any persons except passengers getting on the train or going to the Shreveport train to become passengers thereon. And the plaintiff was not in a position to demand the right to use the vestibules."

8

"The plaintiff had no right to demand the use of the vestibules on the cars.

"When she desired to use them it was her duty to notify the persons in charge of the train, that she desired to use them ,if she desired the men in charge of the train to look out for her safety while crossing."

9

"You are charged to return a verdict for the defendant."

10

"You are charged that if you find from the evidence that Conductor Fowler called "All Aboard" before the train started, and in the usual manner and usual voice it was called by him, and in the usual time before starting his train, you will find for the defendant."

11

"You are charged that people crossing the platform of the cars by going from the south side of them to the north side would not be notice to the defendant's conductor that people would cross the platform of the said cars by going from the north

side of them to the south side of them, therefore if you fail to find that a sufficient number of ladies prior to October 15, 1915, crossed from the north side of the train to the south side thereof by going over the platforms of the cars to cause a person of ordinary care situated as Conductor Fowler was, to reasonably contemplate or foresee that some lady or ladies might undertake to cross the platforms of the cars as the train was due to leave, there would be no duty on the part of Conductor Fowler to give notice to the plaintiff or any of her party that the train was going to move."

12

"You are instructed that the fact that the plaintiff received an injury at the hands of the defendant company would not, of itself, entitle her to recovery, but before she can recover, it is her duty to prove by a preponderance of the evidence that her injury was the direct and proximate result of some negligence on the part of the conductor or engineer of the train she fell or jumped from and received her injury, and if you fail to so find, you will return a verdict for the defendant. And you are further instructed in this connection that an act committed by either of them or an act omitted by either of them would not be negligence unless you find that a person of ordinary care, under the same circumstances, could reasonably have anticipated or foreseen that such an act committed, or such an act omitted, might result in injury to someone, and if you fail to so find, you will return a verdict for the defendant."

13

"You are charged that it could not be negligence for the engineer to start the train with a jerk unless you find from the evidence that person of ordinary care, situated as he was could reasona-

bly have contemplated or understood that the plaintiff or some other lady might be passing over the platform of one of the cars of the train, and if you fail to so find, you will consider that the engineer was not guilty of any negligence in starting the train with a jerk; if you find that he did start it with a jerk."

14

"You are instructed that if you find from the evidence that the conductor called "All Aboard" before he gave the engineer the signal to start the train, and that he so called in the usual tone of voice, or if you find that the engineer rang the bell or started it to ringing before he started the train to moving, you will find for the defendant."

15

"You are charged that if you find from the evidence that men crossed from the north side of the cars to the south side by going over the platforms, and that they did so to the extent that they made it a custom, this would not make it the duty of the operatives of the train to watch out for or warn ladies that the train was going to move, and before you can find that it was the duty of operatives of the train to look out for or warn the plaintiff that the train was going to move you must find by preponderance of the evidence that ladies had been in the practice of crossing from the north side of passenger train No. 2 to the south side thereof by crossing over the platforms of the cars to such an extent that it became a custom and that a person of ordinary care, situated as the conductor of that train was on that date, could reasonably have understood that some lady might be crossing over the platform of a car from the north side of the train to the south side thereof, and if you fail to so find

you will find for the defendant, regardless of whatever else you may find."

10

"You are instructed that if you find from the evidence that either A. Warren or the plaintiff, before starting over the platforms of the car, knew that the train was likely to move at any time, and knew the dangers of being on the platforms of the car when the train would move or that either one of them in the exercise of ordinary care for the safety of the plaintiff, must necessarily have known that the train was likely to move at any time, and the dangers arising therefrom you will find for the defendant, regardless of whether any warning was given that the train was going to move or not."

11

"You are instructed that if you find from the evidence that the plaintiff, before starting to cross over the platforms of the car when it moved, or that, in the exercise of ordinary care for her own safety she must necessarily have known that the train was likely to move at any time, and the dangers arising from being on the platforms of the car when it moved, you will find for the defendant, whether you find that there was any warning given that the train would be moved or not."

12

"You are instructed that if the conductor did not give notice that the train was going to move, or that the engineer did not ring the bell of the engine, it would not be negligence, because there is no evidence that either the conductor knew that the plaintiff was in the act of crossing the platforms of the car."

13

"You are instructed that if the engineer did start the train with a jerk or jar at the time to

question ,it would not be negligence, because there is no question that the engineer knew or had reason to believe that the plaintiff was in the act of crossing the platform of the car."

20

"You are charged that if you find from the evidence that when the plaintiff attempted to cross over the train she knew or had reason to know that the train might start at any time you will find for the defendant."

22

The Court erred in charging the Jury as follows:

"Applying the propositions I have announced to the facts in evidence before you, if you find from a preponderance of the testimony in this case that the plaintiff, Miss May Marcus, on the occasion in question, was returning from the New Orleans train of the Texas & Pacific Railway Company to the station of that company or to her home in crossing the Texarkana train of the defendant company, she was thrown to the ground and injured, as claimed; and if you further find from a preponderance of the evidence that the operatives in charge of the Texarkana train either knew that Miss May Marcus was about to board the train for the purpose of crossing it, or if from all the circumstances before you you believe that by the exercise of ordinary care they could have discovered that she or some one else might be reasonably expected to attempt to cross the Texarkana train at that time and place; and if you further find from the preponderance of the evidence before you that the operatives in charge of the Texarkana train failed to close the vestibule doors and started the train without giving any signal or warning that they expected to set it in motion, and if you further find from a pre-

ponderance of the evidence that the train started, Miss Marcus being upon the train under those circumstances, by a sudden jerk or jar and she was thrown to the ground and injured and you further find from all the evidence before you that the acts of failing to close the vestibule doors and failing to give proper signals that the train was about to be set in motion and starting the train with a sudden jerk or jar, taken individually or collectively, amounted upon the part of the operatives in charge of the Texarkana train to a failure to exercise ordinary care, that is such care as a person of ordinary prudence would have exercised under similar circumstances, and that this failure was the direct and proximate cause of her being thrown to the ground and injured, then plaintiff would be entitled to recover."

This charge was error because there was no evidence that the persons operating the train knew that plaintiff was about to board the train for the purpose of crossing it.

Second. It is further error, because the evidence did not show that by ordinary care those persons in charge of the train could have discovered that the plaintiff, might be reasonably expected to attempt to cross the Texarkana train at that time and place.

Third. It is error because it was not the duty of the operatives of the train to do anything to ascertain whether the people were attempting to cross his train from the opposite side in the absence of something to show that he had reason to expect the persons would be crossing.

Fourth. It was error to submit the question of the sudden jerk or jar of a train, because there was no evidence to justify the jury in concluding that the jar or jerk of the train was sufficient un-

der the circumstances of this case to constitute negligence.

23

The Court erred in charging the Jury as follows:

"In this case the Court had admitted in evidence before you the custom of the people of Marshall of crossing the vestibules of the Texarkana train for the purpose of going to and returning from the New Orleans train to the depot of the defendant company and various homes and places of business in Marshall. The Court informs you that you may consider this testimony as to the custom prevailing in Marshall in reference to crossing the vestibules of the Texaskana train in determining whether it was negligence on the part of the operatives of the Texarkana train in starting the train at the time plaintiff was injured, that is, whether the operatives of the Texarkana train knew or by the exercise of ordinary care might have discovered that plaintiff or some one else might attempt to cross the train at that time and place, and that the starting of the train would place them in danger. All the testimony in reference to the custom may be considered by you as bearing on the question of whether the operatives in charge of the train were guilty in starting the train at the time Miss Marcus boarded it."

This was error because there was not any evidence that the plaintiff knew of this custom of people crossing the train as she did, or that she relied on said custom when she attempted to cross the train, and the consideration of the custom of other people crossing the train in that way would not aid the jury in determining whether the defendant company was negligent with reference to the plaintiff.

The Court erred in charging the Jury as follows:

"I further instruct the Jury that the evidence that the vestibules of the Texarkana train were left open, and that had been the custom that had prevailed at Marshall, and that people had been crossing the Texarkana train in going to the New Orleans train and returning to the station and to their homes may be considered by you in passing upon the question of whether the plaintiff, Miss Marcus, was guilty of contributory negligence in attempting to cross the train through the vestibules at the time she fell from it and was injured ,it being a question in the case as to whether in making the attempt to cross the Texarkana train she was guilty of contributory negligence ,and the Court has admitted the testimony that it was the custom to leave the vestibules open so that the Jury might consider it in determining whether the plaintiff was guilty of contributory negligence in attempting to cross the vestibule."

This was error because the fact that the doors of the vestibules were left open could not properly be considered by the jury on determining whether the plaintiff was guilty of negligence or not, because the evidence shows that it was proper to leave the vestibules open in order that the people might leave the Texarkana train on the north side to go and board the New Orleans train, and there could not be any impropriety charged against the Railroad Company for leaving the vestibule open, and there is no claim that said vestibules were left open as an invitation to the people situated as plaintiff was situated to cross over the Texarkana train in coming from the New Orleans train.

The District Judge in submitting the case to the jury

did so in the most general terms. He instructed the jury that the plaintiff relies as the ground for recovery on three different propositions.

> **1. The failure of the Railroad Company to close the vestibule doors of the Texarkana train before it started to back out from the station.**
>
> **2. The failure of those in charge of the Texarkana train to give warning to persons who might be attempting to cross the train before starting it, of its intention to start.**
>
> **3. That those handling the Texarkana train when they started to move it, gave it a sudden jerk or jar, which caused the plaintiff to be thrown from the car to the ground and injured. (Rec. 100).**

The remainder of the charge did hardly anything more than elaborate these various grounds of recovery. The plaintiff excepted to the Court's giving charge in submitting as a ground for recovery that the vestibules of the Texarkana train were left open, because this could not properly be considered an act of negligence. This is presented in our 24th assigned error.

It will be seen that the Court in charging the jury told them that plaintiff relied on three grounds of negligence:

> **First. The failure of defendant to close the vestibule doors before starting.**
>
> **Second. The failure to give warning before starting.**
>
> **Third. Starting the train with a jerk. Rec. 100 at top of page).**

The Court also charged the jury that the three things taken **individually or collectively,** may be held to be negligence making the defendant liable (Rec. 101 nine lines from bottom). That is, either one of three grounds may be sufficient to sustain plaintiff's case.

First.

We contend it was not negligence to have the vestibule

doors open. Conductor Fowler testified that passengers for the Shreveport train got off of the train on the north side (Rec. 82). Clark, witness for the plaintiff, testified that the vestibules were left open for people to go from the Texarkana train to the Shreveport train. (Rec. 58 at top). No evidence contradicted this.

We think it was clearly proper to leave the vestibule open until the train started, and there is no proof of any rule or custom to the contrary.

Second.

Those in charge of the train did not have to give warning to people situated as plaintiff was, in the absence of some proof that persons in charge of the train had some knowledge or reason to believe that some person would be injured by the starting of the train.

There is no claim that the trainmen actually knew that plaintiff was passing over the train when it was put in motion, but they say they should look out to see before starting the train.

The train was headed east, the depot on the south side, and two or three car lengths east of the place of accident, perhaps 200 feet from plaintiff.

Plaintiff's witness, Weisman, testified that when they were returning from the Shreveport train they started to go round the west end of the Texarkana train, and they observed the vestibule open so they attempted to cross over the train (Rec. 53, 12 lines from bottom). It required only a moment for them to climb over, so if the conductor had come back to see if any person was climbing over he would have seen no person unless he had remained there in view of their sudden change of mind from going round the train to crossing over.

So far as there being a custom of people climbing over that train, and that such a custom imposing on the railroad the added duty to go and examine each vestibule and see that no person is climbing on, such a custom would be con-

trary to public policy and not consistent with the efficient management of the railroad in the public welfare.

No person contends that the vestibules should have been closed all the time, and we know that persons are boarding and leaving the train up to the very moment it starts, and often persons get on or off after it starts. So the vestibule should be left open until the train starts.

Third.

The mere fact that the train started with a jerk is not proof of negligence. The jerk must have been unusual for all trains start with more or less jerk or jar.

Boston Elevator Ry. vs. Smith, 168 Fed. R. 629.

The charge of the court does not require that the jerk be unusual, and permits the jury to hold defendant liable if the train started with a jerk, and this alone might make defendant liable, for he submits the three grounds of negligence, and then tells the jury that if these grounds exist individually or collectively, defendant would be liable.

The above three points will be elaborated in the following pages.

It is to be regretted that the Circuit Court of Appeals did not give its views on the points so that the Railway Company could know for what it was condemned.

I do not believe that the Court meant to hold that all the three of the charges of negligence were sustained; to do that we must hold that:

Although the Railway had a right to leave the vestibule open, and a right to start without giving warning, yet if we started with a jerk we would be liable.

Although we did not start with a jerk, and had a right to start without warning, yet if we left the vestibule open we would be liable.

Although we did not start with a jerk, and had a right to leave the vestibule open, yet if we started wothout warning we would be laible.

I do not think the Court intends to so hold, and yet that is the meaning of an affirmance.

First.

Under the circumstances of the case, it can not be considered an act of negligence for the Railway Company to have left the vestibules open on the Texarkana train.

The defendant company requested the Court to charge the jury that it can not be held an act of negligence for the Railway Company to have left the doors of the vestibule on the cars open at the time plaintiff and her companions attempted to cross over the car. The Court refused to give this instruction. (Rec. 110-111). The Court thereupon charged the jury that they could find for the plaintiff if they find that the operators in charge of the train failed to close the vestibule doors and started the train without giving any signal or warning that they expected to set it in motion. Having connected this act of negligence with the other acts, he then charged the jury to find for the plaintiff if the various acts taken "individually or collectively" was a failure to exercise ordinary care. (Rec. 102).

The conductor, Fowler, testified: "I could not answer why the vestibule door on the north side of the train was not closed as soon as the passengers left No. 2, the Texarkana train ,for the Shreveport train. It is not left open for the purpose of permitting people to pass over the train at the rear end of the chair car or at the front end of the chair car; it is open for the purpose of discharging passengers for the Shreveport train or the city. Passengers for Marshall get off on the south side of the train and those for the Shreveport train get off on the north side. We left the doors open so people could pass to and from the Shreveport train. (Rec. 82). The doors were not left open for the purpose of creating a passage for people who happened to be on the north side and wanted to come to the south side, but the doors were left open for the accommodation of passengers and the train crew and employes. We generally have it so arranged that there will be some one to protect the openings on either side and after the passengers are receiv-

ed and discharged the men leave those places to look after other duties they have to perform. It is not usual practice for passengers to get on the Texarkana train on the north side." (Rec. 83).

Plaintiff's witness, Ray Clarke, testified: "The vestibules on the north side of No. 2, the Texarkana train, would be left open so the passengers could leave No. 2 and go over and embark on the Shreveport train. People south of the track would also pass over the steps of No. 2 to get to the Shreveport train and return from the Shreveport train to the depot. I have seen quite a number of people do that and have seen it for a number of years before plaintiff's injury. (Rec. 58).

Cross examination, he said: "I have seen people cross over there going to and from the Shreveport train."

Various witnesses testified to the fact that the vestibules were left open when the train from the west came in in order to allow passengers to disembark from the train on either the north or south side. So this is shown to be a custom and it also is shown to be a proper custom to accommodate the passengers desiring to go to the Shreveport train. There is no evidence showing that there was any reason for the defendant company to close the vestibules before the train was moved out, and indeed, we think it would hardly be a proper custom to inaugurate, because frequently persons desiring to take pasasge on the train arrived up to the very moment of its departure, and if they were shut out from boarding the train by reason of the vestibules being closed, they would have just cause to complain because they could board any time in safety up to the very moment the train started to go. And we submit that it would be an improper thing to do to allow the jury to predicate engligence upon such conduct as is shown in this case with reference to leaving the vestibule doors open. It does not appear that any complaint was ever made that it was improper to leave the vestibule of the cars open until after this particular accident. It is not shown that it is out of the

ordinary operation of the cars in coming into the station at Marshall. In the case of Houston & Texas Central Railway vs. Alexander (103 Texas, 597) as a case where an employe in climbing on to an engine for a proper purpose, put his foot on a tool box which was covered with grease, which caused his foot to slip off and caused him to fall and receive injuries. It was shown that these boxes were ordinarily found to be covered with grease. The Court says: "Was the mere keeping of the box in such a position for such a purpose an act which persons of ordinary prudence using such engines would not have done? It is not asserted that it was. On the contrary, if the evidence is true, they all did it. The evidence shows, without controversy, that the condition existing in this respect was the usual and normal one resulting from the use to which the box was put. There was nothing in it differing from that of such things customarily furnished for the use of employes in Railroad business. It was not an unusual or unexpected condition." "But what is the standard by which the question, whether or not that care has been exercised, is to be determined but the conduct of prudent and careful men in the business under investigation? And when the evidence not only fails to show a departure from the line of conduct pursued by such men, but shows affirmatively complete conformity to it, how can the conclusion of negligence be drawn? Whatever the experience of jurors may enable them to know of affairs of some kinds, it is certainly not true that they can be held to know how such a business as that here in question should be conducted better than all the employers and employes engaged in it. With only such evidence in the case no issue is presented for a jury to pass upon." And the Court then proceeds to hold that there was no evidence which would justify the jury in finding that the Railway Company was negligent in using a box covered with grease, so in this case we think the conduct of the Court is subject to the same criticism. He has submitted to the jury to find, if they desire to find, that the Railway Company was

negligent in leaving the vestibule open until the train started. There has not been pointed out in the evidence any harm that has come from leaving the vestibule open except the harm to a person who was only at best a licensee in the use of this particular train. The record does not show that the verdict was not based on this particular branch of the case, and to sustain the verdict against the plaintiff on this ground, the Court must necessarily adjudge that the Railway Company should not leave the vestibules of its cars open to the ingress and egress of the public while the train is standing at a station, but should close these vestibules in advance of the train moving out. We submit that such a conclusion would be contrary to the proper management of passenger trains.

Second.

Under the circumstances of this case, the trainmen were under no obligation to use care to see whether persons who had gone to the Shreveport train were crossing over the Texarkana train when it was started in backward motion.

L .A. Fowler testified that he was in charge of the Texarkana train. When he arrived at Marshall he went first to the telegraph office, which is on the north side of his train, to receive his orders. He then returned to his train, took a stand near the bagagge and express car and watched the loading and unloading of baggage and express. When that was done we were ready to leave. We are from between 10 and 18 minutes remaining at the station. When we were ready to go I called "All Aboard" and gave the signal to back up, and I instruct the crew when I give the signal "All Aboard" to hold up their lanterns. I know I holloaed it more than once. I then gave the engineer the back-up signal. That signal is given with a lantern at night. We were late that night and had been delayed a little over the dead time. (Rec. 79-80). It was proved by R. K. Turner and others for the plaintiff, that when the Texarkana train would come into the station at Marshall, there was a habit

and custom of people passing across to come from the Texarkana train to the Shreveport train and back from the Shreveport train to the hotel. They would pass over the cars of the Texarkana train; sometimes they would go around the Texarkana train. (Rec. 59-60). I have crossed over the Texarkana train myself. I didn't have any information that it would stand there long enough for you to get across; I would just take chances on that and would make no inquiry. (Rec. 61).

The Court charged the Jury that he admitted in evidence the custom prevailing in Marshall in reference to the vestibule of the Texarkana train, and told the Jury he considered that fact in determining whether it was negligent on the part of the operatives of the Texarkana train in starting the train at the time plaintiff was injured; that is,whether the operatives of the Texarkana train knew or, by the exercise of ordinary care, might have discovered that the plaintiff or some one else might attempt to cross the train at that time and place, and that the starting of the train would place them in danger. The plaintiff excepted to this charge because there was not any evidence that the plaintiff knew of this custom of people crossing the train and attempting to cross in reliance upon that custom. And the consideration of other people crossing would not aid the jury in determining whether the defendant was negligent. This was shown by our 23rd Assignment of Error. (Rec. page 23). Court charge submitting this matter is in the Record, 104-105.

The defendant company requested several special instructions submitting this matter to the jury as it was viewed from the defendant's standpoint, which instructions the Court refused to give.

Instruction No. 2 (Rec. 111) the defendant requested the Court to charge that plaintiff did not stand in such relation to the Railway Company as that she was entitled to receive notice of the intention to start the train. And special charge No. 3, the defendant requested the Court to charge

that there was no evidence that the conductor who gave the signal for the train to start knew that plaintiff was in a position that the starting of the train would likely cause injury to her and, therefore, the defendant would not be liable on the ground that the conductor was negligent in starting the train.

And the 4th special instruction, the defendant requested the Court to charge. The fact that numerous persons had, at various times, crossed over the train as plaintiff attempted to do, would not make it the duty of the persons in charge of the train to examine and see if any persons were crossing over before they gave the signal to put the train in motion.

And in special instruction No. 5, the defendant requested the Court to charge that it appears from the evidence that plaintiff was not induced to cross over the train by the fact that other persons, at other times, had crossed over it, and that those facts can not be considered as evidence of the defendant's liability. These several charges are assigned as error by us in the Record, pages 13 and 14.

In considering this question, it appears that the plaintiff with about five other persons, relatives of Mrs. Winton, had gone to bid her goodbye, as she was leaving on the Shreveport train; that the party had all gone from the Shreveport train, and in making their way back to town, they found the Texarkana train in its accustomed place on the main line. They knew it was the Texarkana train—knew it would proceed on its journey in a few minutes, and rather than go around the end of the train which was not more than one or two car lengths, they chose rather to go over the vestibule of the cars from the north side to the south side. The south side being the side from which people usually got on and off of the Texarkana train.

Now it is clear that plaintiff May Morton, was not a passenger and was not entitled to the rights of a passenger boarding the Texarkana train. Whether she was there by invitation or by license may, or may not become material,

[illegible]

[illegible]

[illegible]

ing the train standing still just at that time long enough so that the plaintiff could have safely left the train. In other words, was the plaintiff placed in such a relation to the company that it was the absolute duty of the company to withhold the train for him to get off safely at that time? Neither the company, nor its employes and servants, in the management of the train, had any notice whatever that the plaintiff was anywhere about the train. Must they not be placed in fault before they can be charged with liability? Must they not know what it is their duty to do in such an emergency, by a knowledge of the emergency itself, before they can be charged morally or legally with a breach of such duty? Negligence, unless constructive and absolute, must depend upon the circumstances of the case, and those circumstances must be such as to create a duty which can be neglected or violated. These propositions would seem to be axiomatic and self evident.

"The duty of the company in such a case is relative, and not absolute. It seems to me that law would work in such a case the grossest injustice, if it could create a liability of the company. It would seem to be the first duty of the person entering a train for such a purpose to notify some one in its management of his presence, business and purpose, so as to create some relation to the company, and make it its duty to care for him. The principle is elementary, in all such cases, that the liability of the company to a person injured by being in such a place of danger depends upon the company's failure to use ordinary care to avoid injuring him after becoming aware of his danger. Shear & R. Neg. 36. Even a passenger must give the company notice when he leaves his proper place on the train in order to create a duty in the company to care for him out of such place. 2 Wood, Railways 1134, 1135. Where a person not a passenger escorted a lady friend onto the cars, and to find her a seat, returned to the platform, and was thrown therefrom by the motion of the train and injured, he was not allowed to recover, and one reason given was that no one of the employes

had any notice of his being on the train. Railroad Co. vs. Letcher, 69 Ala. 106. The Court says, in the opinion: 'All who were in charge of it (the train) were ignorant that the plaintiff was upon it, and without notice or request to any of them to slow or stop the train,' etc. In Keller vs. Railroad Co., 27 Minn. 178, the duty of holding a train long enough for a passenger to get off, is made to depend upon the presumption that the company knew, and upon the implied notice that the passenger wanted to get off at that place. In Gillis vs. Railroad Co., 59 Pa. 129, the duty of the Railroad Company was made to depend upon the business relation implying privity with the company of the person not a passanger. The case of Doss vs. Railroad Co., 59 Mo. 27, was made to depend upon the neglect of the company to stop at the proper place, and long enough for the lady passenger and her child to get on or off the train, so that her lawful escort was injured by getting off. Having notice of the passenger, the company had the same notice of her escort. The case, as it was an extreme one, and in conflict with the current of authority upon the question; but it does not dispense with notice to the company of the presence of the stranger, and the company was guilty of negligence towards its passenger by starting too soon. In Sutton vs. Railroad Co., 66 N. Y., 248, it was held that the implied notice of the deceased being on the track, because it was common for persons to cross the track at that place, was not sufficient to make the company owe him any duty to set the brakes or otherwise fasten the cars. In Townley vs. Railway Co., 53 Wil. 626; s. c., 4 Am. and Eng. R. R. Case, 562, the liability is placed upon the implied notice to the switchman that the little girl was on the track, because he might have seen her if he had looked, and that it was his duty to have looked to see if any one was on the track. In Gautret vs. Egerton, L. R. 2 C. P. 374, there was an implied notice by the escort accompanying the passenger, if not actual notice. In this case the plaintiff was alone, and on the cars clandestinely, without notice to the company, express

or implied; but it would seem unnecessary to accumulate authorities to such an obvious principle.

"In this court there have been numerous cases made to depend upon notice to create duty and liability, where such duty and liability were merely relative and not absolute, as in this case. Why should the managers of the train have held it there longer than to do the regular business at that place for this plaintiff to get off, when they did not know and had no reason to know that he was on the train. It would be unreasonable and reckless to hold that the company are required to stop their trains just so long at every depot, and that everybody has the right to depend upon the strict performance of this duty. If the train be behind time, that time must be made up or some collision might occur. The time must depend upon the business they are required to do safely with the persons to whom the company owes any duty. Beyond that there is no reason."

In Bennett vs. Railroad Co., 102 U. S. 584, 585, it was said: "It is sometimes difficult to determine whether the circumstances make a case of invitation, in the technical sense of that word, as used in a large number of adjudged cases, or only a case of a mere license. 'The principle,' says Mr. Campbell, in his treatise on Negligence, 'appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it.'"

In the case of Lucas vs. New Bedford Ray., the Mass. case 6, Gray 64, 66 A. M. Dec. 406. In this case it is distinctly held that where a person who is not himself a passenger, is injured by a passenger carrier, the burden is upon the plaintiff to prove the exercise of due care and that the carrier was guilty of negligence and that passenger carrier need exercise only ordinary care for a person who enters the cars not to become a passenger, but to assist an aged and infirm relative to a seat and is not bound to give such person any special notice of the time of the departure of the train.

In the case of Lawton vs. Little Rock Ry., 18 S. W. 453, was held that a person who enters a railway car to assist a lady to a seat can not demand that the train be held for the full length of time usually required for passengers to get on or off at that place but can only demand that it be held long enough for said person to get off upon notice to the trainmen that he desires to do so. In the course of the opinion it was held that one who goes upon a train to render necessary assistance to a passenger enters upon an implied invitation, and the Railway Company in permitting them to enter with knowledge of his purpose, is presumed to use care that he may execute it, and is bound to hold the train a reasonable time therefor, but the duty is depending upon a knowledge of his purpose by those in charge of the train, for without such knowledge they may reasonably conclude that he entered to become a passenger and cause the train to be moved after allowing him the reasonable time to get aboard. The same fact is a case of Railway Co. against Miller 27 S. W. 905, wherein the Lucas case cited above is approved and it was specially held that when he went upon the train in order to place upon the company the duty of holding the train especially for him to disembark, he must have given notice of his intention. In the case of T. & P. Ry. against McGilvray 29 S. W. 68, is to the same effect. In that case the following charge was held proper and would have been given to the jury: "If the Railway Co. did not know that plaintiff desired to get back off the train after he had assisted the ladies on the train, but supposed he desired to take passage on the train, then the company would only have to hold the train long enough for all persons to get on the train, and if the plaintiff did not inform the employes of the defendant that he desired to get back off the train, and did not request the trainmen to stop the train for him to get off, then he can not recover.

It will be observed that running all through these cases is the rule that where a person not a passenger and not intending to take passage on the train must bring notice home

to the company, and to the persons operating the train if he desires any particular thing done in his behalf. Applying the cases we have cited to the case in hand, and supposing that May Marcus had gone on the Shreveport train with her cousin, and while attempting to get off the train, it had started and caused her injury, then we have the clear holding of the case that she could not recover ,although rightfully on the train, unless she had brought home to those operating the train information that she was in a position to call for the train being held a longer time. And we think it also clear that her rights are less than they would have been if she was injured in the very train where she had seen her cousin seated. She had completed her social duty to her relative and she had no more right to cross the Texarkana train than any other person rightfully at the depot. Under the authorities cited, Texarkana train must wait long enough for all passengers desiring to board it or leave it to have done so, and it must wait longer for persons rightfully on the train **if the operatives have such information as calls for a longer wait,** but in the absence of such information those in charge of the Texarkana train had a right to go without giving notice to anybody who were not passengers on that train, unless they had information that some person was in a position likely to be injured by the sudden movement. And we contend that the specific vice in the Court's charge is that those operating the Texarkana train could be held negligent by reason of the jar, if, by the exercise of ordinary care, they could have learned of plaintiff's position even though they did not in fact know of her position. We think that this is not the law; that those operating the Texarkana train owed a duty to its passengers and they owed no duty to any other person in the absence of information that they were in position to call for special treatment.

Third.

The defendant Railway Company would not be liable for the injury caused by a jerk or jar of the train, but the jerk must have been an unusual one

resulting from negligence to make the defendant liable.

Plaintiff alleges that when she got on the Texarkana train to cross over it, that the defendant's employes caused the train to be suddenly moved to the west at a high and rapid rate of speed, and that the said train was given a sudden jerk, lurch, or bump that caused the plaintiff to fall. (Rec. 5).

A. Marcus tesified that he had gotten off the train and his daughter, Adrian, had gotten off and when his daughter, May, the plaintiff, was on the steps of the coach about to alight, train gave a jerk and she fell. Train started back very suddenly. I didn't pay any attention to it, but I noticed that train started with a jerk and that is how come plaintiff to fall. (Rec. 39).

Adrian Marcus testified: "The train started with a jerk just as quick as it could, and that threw my sister off on the ground." (Rec. 43).

Salm Wolff testified: "I was back of the plaintiff at the time the train gave the jerk, and she was on her way down the steps of the coach. The train made a sudden jerk, and she was on her way down the steps of the coach. The train made a sudden jerk or start. (Rec. 50).

M. L. Weisman testified: "When we started from the Shreveport train ,we saw the Texarkana train between us and the depot. It was dark. Our first intention was to pass around the train, but we found an opening between the cars and started through that way. The vestibules between the cars were open and we concluded to cross over there. The train moved suddenly and that caused me to kind of fall forward towards the door. (Rec. 53). I knew when that train got through with its business it would back away from there. When we first started home, my idea was to go around the train. I didn't expect for the space between the cars to be open, and didn't look for it to be open. I had an idea it would be closed on the north side, therefore we would have to go around. When I found it open, I

found something unexpected, took advantage of the situation, and went through there. There was no employe of the Company there at the steps. The engine of the train was about the Elgin hotel; about 240 feet from where the accident occurred." (Rec. 55 and 56).

R. K. Turner testified that people frequently crossed over the Texarkana train to get to the Shreveport train. I have taken my sister-in-law to cross there myself. I didn't, in crossing, have any information that the Texarkana train would stand there long enough for me to get across. I just took chances on that and would make no inquiries. (Rec. 61).

Early Akin testified for plaintiff: "That frequently people would cross the Texarkana train going to and from the Shreveport train. While the train would stand there they would keep the vestibules open. When the vestibule doors are closed there is no place between the cars through which one could pass. On cross examination he said if the vestibule doors were closed, of course, people could not get on the train. People that wish to take passage on the Texarkana train ought to have the right to enter the cars all the time train is standing there, and ought to have a right to get off all the time. It is customary for the doors on the north side of the Texarkana train to be open, and a man standing there announcing 'This side for the Shreveport train.' Some people cross over the Texarkana train to go to the Shreveport train. Some people stand on the south side until the Texarkana train moves out." (Rec. 62).

B. A. Cargill testified for the plaintiff: "That he had seen people cross over the Texarkana train to go to the Shreveport train. The vestibules were left open while the Texarkana train was standing there. Marshall is a town of about 13,000 people and there is a good deal of traveling on both these trains." (Rec. 63).

Cross examination he said: "People could go to the Shreveport train and see friends off and get back on the south side of the track before the Texarkana train come in.

The Shreveport train always waited until the Texarkana train backed out before it started. Passengers would have time to get on the Shreveport train after the Texarkana train had backed out. I have crossed over the Texarkana train often. I was not expecting the engineer and conductor to look out for me; being an officer, I was rather looking out for the whole bunch. I took care of myself." (Rec. 64).

N. A. Green testified for plaintiff: "Passengers who wished to take passage on the Texarkana train got on on the south side and not on the north side. Texarkana train always left before the Shreveport train did." (Rec. 71).

J. H. Wilder, engineer, testified for plaintiff: "On the occasion in question when the train was ready to move, I gave the back-up signal. I started the bell to ringing before I got the signal to back up, and continued to ring until I shut it off. The engineer manipulates the bell ;it rings automatically. This automatic bell ringer was in good shape that day. I didn't know anything about the injury until I heard it a few days later. It was the custom to ring the bell before starting. When I was notified that there had been an accident there, I remember well ringing the bell. When the conductor gave the signal to start he was standing by the express cars. It must have been twenty seconds after I began ringing the bell before we started back." (Rec. 77-78).

R. H. Bortle testified for defendant: "I have been firing for Mr. Wilder three years. Mr. Wilder was very careful about ringing the bell, and would not move unless it was ringing. If anything went wrong with the bell ringing, Mr. Wilder would ring the bell by means of the bell cord. To my knowledge, he never moved out of a station without ringing the bell. The track at Marshall is up grade going west from the station, and hard to give the train a jerk there backing out. Mr. Wilder was always careful about jerking the train. If he had not rung the bell it would have been so unusual that I would have noticed it. I would not

be putting fire in the engine when it was standing still." (Rec. 78).

L. A. Fowler testified for the defendant: "I was conductor of the train at the time of the accident. We took some cars. When we got through our work I gave the engineer the back up signal. It could not have been very long after I holloaed 'All aboard' before the train started, because I don't say that until the train is ready to leave. At junction points such as Marshall, I usually say all aboard twice and sometimes, when the passengers are a little slow, three or four times. I know I holloaed all aboard on this occasion. I holloaed in the usual way, and I know the bell was ringing as the train moved out. The engineer started the train after he started the bell to ringing. We were late that evening, and had been delayed a little over the usual time. (Rec. 80-81). The vestibules are not left open for the purpose of permitting people to pass over the train at the rear end of the chair car or at the front end of the chair car. It is open for the purpose of discharging passengers for the Shreveport train or the city. Passengers for Marshall get off on the south side and those for the Shreveport train get off on the north side. We leave the doors open so people can pass to and from the Shreveport train over the steps of the Texarkana train. (Rec. 82). It is not the usual practice for passengers to get on the Texarkana train on the north side. The porter will usually go to the south side to receive and discharge passengers, because that is the side the station is on and passengers will be on the side next to the station." (Rec. 83).

J. H. Hill testified for the defendant: "Express and baggage business was down on the south side and passengers get off the train on the south side and get on the train on the south side. (Rec. 84). I have seen people cross over the Texarkana train going to the Shreveport train. I have never seen women do that. The Shreveport train generally waits for the Texarkana train to back out before it starts." (Rec. 85).

John Quinn testified for the defendant: "I was at the Ginocchio hotel near where the plaintiff fell. I heard the conductor holloa 'All aboard' and about the time he holloaed, maybe ten seconds later, I noticed these people coming over the train. When I saw the people it made the impression on me that they would have to stay on the train or fall when they got off. (Rec. 86). When the conductor holloaed 'All aboard' I judge he was around the baggage or express car on the south side of the train next to the depot. I don't know where the other employes of the train were. When the conductor holloaed all aboard I don't suppose more than two of the people were on the vestibule of the car." (Rec. 87).

H. L. Eaton testified for the defendant: "The bell on the engine was ringing when the train started. I knew the train was going to start when I heard the conductor say 'All aboard.' I knew it was ready to start. I had nothing to do with the train. (Rec. 89). I don't know where the people were when the conductor holloaed 'All aboard.' I didn't see the conductor give the back up signal." (Rec. 90).

H. Dodd, a train porter on the train, testified for defendant: "When the train arrived at Marshall, I discharged the passengers on the front end of the smoking car. I was not at the entrance between the smoking car and the chair car. After I got through there I went to the baggage car and then went to the rear end of the train to ride the back end out of Marshall. There had to be someone on the back end as the train backed out. I raised the light when the train was ready to go. I gave the conductor the signal that everything was all right and he holloaed 'All aboard.'" (Rec. 90).

L. A. Fowler, recalled, testified: "Schedule time to arrive at Marshall was 7:10. We arrived on that evening at 8:40. When it is necessary to set out cars or take on cars, the employes have to have the vestibules open to permit the men to go backward and forward to do their work. When we got ready to leave that night I didn't go and look at the

vestibules to see whether any people were coming across from the north side, that was not customary. I was not expecting anybody to go from the north side because it was not the place for receiving and discharging passengers. It was very seldom that anybody got on the Texarkana train from the north side." (Rec. 91-92).

The Court charged the Jury:

That if the Railway Company in the exercise of ordinary care could have discovered that the plaintiff or someone else might be reasonably expected to attempt to cross the Texarkana train at that time and place, and if they further find that the operatives of the Texarkana train failed to close the vestibule doors, and further find that they started the train without giving any signal or warning and with a sudden jerk which caused her to be thrown to the ground and injured; and if these things taken "individually or collectively," amounted, upon the part of the operatives of the Texarkana train, to a failure to exercise ordinary care, then the defendant would be liable. The Record (page 107) shows that we excepted to this part of the charge and it is presented in our 22nd error wherein our objection set out that this charge was wrong because there was no evidence to justify the jury in concluding that the jar or jerk of the train was sufficient under the circumstances of this case to constitute negligence. Our contention being that the mere fact that a railway train starts with a sudden jerk is not evidence that this jerk was the result of negligence on the part of the Railway Company, because all trains start with a more or less jerk and in order for the evidence to justify the jerk being the result of negligence, it must be an extraordinary or an unusual jerk. This matter was elaborately considered by the Circuit Court of Appeals for the First Circuit in the case of Boston Elevated Railway Company against Smith, 168 Federal Reporter 629. In that case a large and fleshy lady was injured by getting on an electric street car. She had gotten on the car but before she had obtained a seat, car started with a jerk and

threw her down and injured her. She was a stout woman in her appearance and slow in her movements. She was accustomed to riding in electric cars. She had mounted the platform and was about to enter the car door with her umbrella and bag in one hand and holding her dress with the other, and the car was started with a sudden jerk, which threw her to the floor. The Court in reviewing the evidence stated that while the evidence shows that the plaintiff's fall and injuries were caused by the movement of the car in starting, there is no substantial evidence that the car was started with any unusual jerk. The statement of plaintiff in her declaration that she was violently thrown down in starting the car is not substantiated by the proof. The Court saying:

> "It is well understood by persons accustomed to ride on electric cars that the cars are liable to start with more or less of a sudden movement or jerk. Since this is one of the known and common incidents of traveling by this mode of conveyance, the ordinary passenger may be said to assume this risk. He expects that the car may start with a greater or less degree of jerk, and he realizes that he must exercise due care to protect himself against such a movement. The mere fact, therefore, that the car started with a sudden movement or jerk, and that the plaintiff was hurt, does not make out a case of negligence in the manner of starting the car, but the proof must go further and show that the start was **unusually sudden or violent.**" (Our italics).

The Court then cites a number of Massachusetts cases holding that the movement of the car must not only be sudden but must be unusual, and reverses the judgment on the implied holding that the plaintiff had not shown the right to recover. We think this case illustrates very clearly the rule of law that when applied to the case at bar will make the Court's charge erroneous in submitting to the jury that

they were at liberty to consider that the Railway Company was negligent if they started the train with a jerk and not requiring them to find that the jerk was unusual or violent.

It is common knowledge possessed by every person who rides on the train at all, that if there but a small jerk or jar to substitute a person who is standing on the car and not expecting the start or jerk to be made. This was the situation of May Warren. She was crossing over the car and, of course, not expecting it to be moved at all, and was just in the act of stepping from the car to the ground, therefore it can readily be seen that the ordinary and usual motion of the car would throw her off her balance and cause her to fall from the steps. The Court here by its charge has permitted the jury to find that those operating the train were negligent if the train started with sufficient jerk to cause a person to fall who was not expecting the start, and who was in the act of stepping from the train to the ground. We submit that not only would such a holding be contrary to the case of the Boston Elevated Railway Company against Smith, cited above, but it would be contrary to the very nature of the case, and it would be improper to sanction such movement of its cars a ground of recovery.

We think, too, that it may be fairly concluded that the Railway Company was prejudiced by the evidence introduced as to the custom of people in general in going across the Terminal train to get to the Shreveport train. There is no evidence that May Warren, in attempting to cross, relied on that custom as a protection to her in attempting to cross, and there could be no just contention that the crossing over that train had made it such a public passway as that the operatives must go and examine such vestibule to see that some idle third person may not be injured by the movement of the train. Take the situation which was as follows: The train was headed east; the engine about 500 feet from where the accident happened. The conductor on the south side of the train superintending the unloading of baggage and express some distance—perhaps 100 feet or more—and

ered peril. Or as the Federal Courts denominate it, the last clear chance doctrine; that is, if the persons operating the train discover a man in peril they must use the means at their command to avoid injuring him, although his peril was the result of his own negligence, but that rule has never held that it was the duty of the operatives of the train to use care to discover the man's peril when his own neglect brought about his perilous position. Such was the ruling of the Supreme Court of Texas in the two cases, T. & P. Ry. vs. Breadow 90 T. 27, and T. & P. vs. Staggs 90 T. 485, where the rule of law was established that those operating a train did not have to use care to discover and protect from harm a person on the track without right, it was only after the person was in fact observed that the new duty to avoid injuring him arose. The Court has by its charge made it the duty of the trainmen to use care to see whether persons at the depot boarded the train and to so conduct its movements as not to injure them while merely crossing the train. Under the circumstances of this case the conductor had no more reason to expect that May Marcus would attempt to cross the train than to expect any other one of the many loiterers about the depot would make the attempt, so the rule announced by the Judge would require the conductor to anticipate that any person at the depot is likely to attempt to enter or cross the cars even from the off side from the depot at any time up to the starting of the train even though the train has remained standing longer than usual, and the train stopped on that occasion longer than usual, they changed engines, took some cars out of the train and put some in the train. See Conductor Fowler's testimony. (Rec. 79).

We insist on the validity and applicability of the following observations taken from the note in 18 Am. & Eng. R. R. cases 468.

> "There is, however, no common usage or custom for persons to get upon a railway train to welcome guests or relatives who are about to alight. The great and manifest inconvenience of such a prac-

tice, not to speak of resulting danger, is enough to condemn any such proceeding. If passengers be in the performance of their duty toward the company they would be alighting from the train as those looking for them would be getting upon it, and, as likely as not, at different places of ingress and egress as in the case at bar. Moreover, it is so manifestly improper, as well as inconvenient, for friends and relatives of a passenger to enter the train and consume, in greeting such passenger, the time that should be devoted by the passenger to leaving the train that a usage and custom so to do would never grow up. In many cases both would not only work confusion to passenger, arriving and departing, but impose a burden upon railway companies rendering railroading practically impossible. Railway trains are run by time tables so regulated that frequent trains in both directions may pass each other safely at stations on the road; and so numerous are the trains required for the dispatch of the public business, and so great is the public demand for rapid transit that the greatest care is required to so adjust the time of trains—their speed and their stoppage at stations—that the public demand may be met, and at the same time, that danger from collisions may be averted. To this end the time of stoppage at stations is regulated according to the known demands of public travel to allow just so much time and no more for stoppage at stations as shall be reasonably necessary for the reception and departure of passengers, baggage and mail. That is all that the law requires of the company, and therein the duty the company owes to the passenger runs parallel with the necessities of its business; and the interests of both passenger and company are conserved. If, however, the obligation of the company is extend-

exercised ordinary care, it was the most that the law exacted of them.'

"In Sutton vs. Railway Co. (66 N. Y. 248), where the employes of a certain factory had for many years been in the habit of passing over the defendant's track, it was said: 'The licensees acting under this license took the risks incident to the business and of the danger to which they might be exposed from the management of the road in the usual and ordinary way. Nor would a departure in some degree or in some particular by the defendant's employes from the ordinary course of procedure make the defendant liable for an injury resulting therefrom, unless it involved the doing of an act which it might be reasonably anticipated would result in injury to person lawfully on its road under its license.'

"These authorities are sufficient to show that it is the duty of the Railway Company toward those who are on its trains by its license, to run the trains in the usual, ordinary manner, only; and that even some degree of departure from the ordinary practices of the company will not suffice to make the company liable if a licensee on its trains or premises is injured."

We pray the cause be set down for argument and that the judgment be reversed.

F. H. PRENDERGAST,

Attorney for Plaintiff in Error, Texas & Pacific Railway Co.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
MISS MAY MARCUS,
Defendant in Error.

No. 790.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION TO AFFIRM OR DISMISS AND BRIEF AND ARGUMENT OF DEFENDANT IN ERROR ON SAID MOTION.

S. P. Jones,
Marshall, Texas,
Attorney for Defendant in Error.

THE TEXAS & PACIFIC RAILWAY COMPANY
PLAINTIFF IN ERROR.

vs.

MISS MAY MARCUS
DEFENDANT IN ERROR.

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MOTION TO AFFIRM OR DISMISS FILED BY THE DEFENDANT IN ERROR.

Now comes Miss May Marcus, by her attorney, appearing in that behalf, and moves the Court to affirm or dismiss the above entitled cause under subdivisions 5 and 6, of Rule Six of the Supreme Court of the United States, because it is manifest that the writ of error in this cause was sued out for delay only, and that the questions on which the decision of said cause depend, are so frivolous as to not need further argument.

STATEMENT OF NATURE AND RESULT OF CAUSE.

Miss May Marcus recovered a judgment in the District Court of the United States for the Eastern District of Texas at Jefferson, Texas, against the Texas & Pacific Railway Company for the sum of Six Thousand Dollars for personal injuries that she received by reason of being thrown from a passenger train at the passenger depot in Marshall, Harrison County, Texas.

The cause was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit, in an opinion reading as follows:

"By the Court:

> In this case we find no reversible error assigned or patent of record. Judgment affirmed."

About the 15th day of October, 1911, Miss May Marcus received the personal injuries in substantially the following manner, to-wit:

At that time a passenger train, known as the Texarkana train, came into Marshall (a town of about fifteen thousand population) from the West and occupied a track immediately north of the depot and immediately north of Washington avenue. This train, after discharging its passengers and taking on passengers, backed out from the depot west something more than a train length, and was switched over to a track or leg of the "Y" heading the train northward, toward Texarkana. A train known as the Shreveport (or New Orleans) train, which was made

up at Marshall, occupied a track immediately north of the Texarkana train and usually left Marshall about the same time the Texarkana train was backed out of the station. The Texarkana train blocked the north end of Washington avenue, one of the principal streets in the city of Marshall, and the uncontroverted evidence shows that for a number of years persons had passed between the coaches of the Texarkana train going to and from the Shreveport train, and passing from the south side of the Texarkana train to the north side of Marshall. The town was divided into North and South Marshall by the railroad.

Miss May Marcus had gone to the depot and to the Shreveport train to accompany a relative who was leaving Marshall, and while at the Shreveport train the Texarkana train came into the station. Miss Marcus, with other relatives and friends, was returning from the Shreveport train to the street on the south side of the Texarkana train with the intention of going to her home in the south part of the town, and while in the act of alighting from the Texarkana train the same was suddenly moved, which threw her to the ground and inflicted upon her serious injuries. The evidence was sufficient to show that no warning or signal of any kind was given to notify persons that the train was about to be moved.

The trial court fairly and fully presented the case to the jury in a lengthy charge, limiting the rights of defendant in error to recover by placing upon her the burden of showing that the railway company had acquiesced

in the public generally using the vestibule opening between the coaches of the Texarkana train as a passage way to and from the Shreveport train, and to pass from one side of the Texarkana train to the other side, generally; and further showing that the railway company started the train without giving any signal or warning of any kind, and that defendant in error was thereby injured, and that the conduct in so starting the train without giving such signal or warning amounted to negligence upon the part of the railway company.

The plaintiff in error complained in the United States Circuit Court of Appeals of the following errors:

First: That the court should have instructed the jury that it could not be considered an act of negligence for the railway company to have left the vestibule open on the Texarkana side.

Second: That the trainmen were under no obligation to use care to see whether persons were crossing over the Texarkana train when it was started in backward motion.

Third: That the railway company was not liable for an injury caused by a jerk or jar of the train, but the jerk must have been an unusual one resulting from negligence to make the plaintiff in error liable.

The charge of the trial court, which must be considered as a whole, having limited the rights of the defendant in error to recover, to the railway company being guilty of

negligence in failing to give signal that the train was about to be moved, and in starting the train under such circumstances as that the persons in charge of the train should have known that the defendant in *error*, or some other person, was using the vestibule opening in passing from one side of the train to the other, there was no merit in the Assignments of Error relied upon, and the United States Circuit Court of Appeals correctly affirmed the judgment of the trial court.

This cause was removed from the State Court to the District Court of the United States, and has been brought to this court by Writ of Error solely because the plaintiff in error is incorporated under an Act of Congress. There is no plain error of record. (See T. & P. Ry. Co. vs. Howell, 224 U. S. 577).

The defendant in *error*, by her attorney aforesaid, presents with this motion to affirm or dismiss, a printed brief and argument in support thereof, which is hereto annexed.

WHEREFORE, the defendant in *error* prays that the said case be affirmed or dismissed. Or, that if the motion to affirm or dismiss is not granted, the cause be transferred for hearing to the summary docket and disposed of.

S. P. JONES, Marshall, Texas.
Attorney for Defendant in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912

[redacted]

Plaintiff in Error,

vs.

[redacted]

Defendant in Error.

} No. 1301

[redacted]

[redacted]

[redacted]

The defendant in error, Miss May Marcus, recovered a judgment in the United States District Court for the Eastern District of Texas, at Jefferson, Texas, in the sum of Six Thousand Dollars for injuries that she received at the passenger depot of the Texas & Pacific Railway Company in Marshall, Texas, on the 15th day of October, 1911.

The way in which Miss Marcus received the injuries will be better understood in connection with the following explanation of the situation of the depot and the tracks of the Texas & Pacific Railway Company, at Marshall, Texas, at the time she was injured:

The railroad of plaintiff in error divide the town into what is known as the "South side of the railroad" and the "North side of the railroad," the main line of the railroad passing through the town from West to East, from Dallas to New Orleans. At the time of the injury the station was located on the South side of all of the tracks of the railroad. A short distance west of the depot the line of railroad from Marshall to Texarkana led off from the main line to the north. A passenger train, known as the Texarkana train, or No. 2, came into Marshall at that time, late in the afternoon on the track next to the depot, the engine thereof stopping some distance east of the station and the rear end thereof being some distance west of the station.

After the train discharged its passengers and took on passengers leaving Marshall, it usually gave signals of its intention to move by ringing the bell and the conductor

calling "all aboard"; backed from station westward and left Marshall on the line leading off to the north. Before the arrival of the Texarkana train, a passenger train was made up at Marshall for New Orleans and occupied a track north of the Texarkana train, and left Marshall at about the same time that the Texarkana train left Marshall. This New Orleans train waited for the passengers from the Texarkana train.

North Washington avenue, a paved street, and one of the most important thoroughfares of the City of Marshall (a town of about thirteen thousand inhabitants) terminates at the tracks of the Texas & Pacific Railway Company immediately west of the station. The west end of the Texarkana train extended considerable distance west of this street and the east end considerable distance east thereof. For a great number of years, great numbers of people had constantly passed northward on North Washington avenue, crossed the tracks of the railway company at the north end thereof (crossing between the coaches when trains occupied the tracks) and proceeded on to North Marshall; and for a great number of years, while the Texarkana train stood at the station, great numbers of people would cross between the coaches thereof at the said point, going to the north and south sides of the train and going to and from the New Orleans train, both passengers and people meeting friends and speeding guests, and on the day Miss Marcus was injured she had gone to the New Orleans train with a relative who was to leave on

that train, and after the Texarkana train came in and she started to return to her home in the south part of Marshall, with other relative, and was crossing the Texarkana train to enter North Washington avenue and go to her home, when the train was suddenly started backward and she was thrown from the same and her ankle broken, causing a permanent disfigurement and permanently impairing her ability to walk and work. The foregoing facts were uncontroverted, conclusively shown by the evidence.

A great number of witnesses for the defendant in error testified that no outcry was made or signal of any kind given that indicated that the train was about to be moved. Some witnesses testified for the plaintiff in error that the conductor cried out "all aboard" and that the bell was being rung when the train was moved backward.

The Texarkana train had what is known as vestibule doors which could be used to close the passage way between the coaches. Miss May Marcus claimed in her petition, among other things, that the vestibule doors between the cars of the Texarkana train were left open by the railway company for the purpose of permitting passengers, and other persons, to pass from the south side of the track to the New Orleans train, or from that side of the track, to the south side of the track, and that the railway company had long acquiesced in the public habitually crossing over the said Texarkana train in going to and from the New Orleans train, and in passing from one side of the track to the other side thereof, in assisting and

speeding guests and friends arriving and leaving upon said train, and that the railway company encouraged such use of the vestibule openings between the coaches of the said Texarkana train for the said purposes.

The Trial Judge submitted the cause to the jury in a charge that fully presented the law applicable to the case, and authorized a recovery by Miss Marcus, if the jury should find that the railway company had acquiesced in the use of the said vestibule openings for the purpose indicated, and that the train was moved without any signal and under such circumstances and conditions as it amounted to negligence for the train to be moved without proper signals of the intention to move the same having been given, if the injury was caused by such negligence.

The plaintiff in error filed twenty-six separate assignments of error, which, however, in various ways raised in the Circuit Court of Appeals, three propositions upon which the plaintiff in error sought to reverse the judgment of the trial court.

The verdict of the jury establishes that the railway company owed to the defendant in error the duty of giving a signal of its intention to start the train and that it failed to discharge that duty, and that she was injured thereby, as there was an abundance of evidence to sustain the findings of the jury on these points.

This suit was prosecuted and a verdict recovered in favor of the defendant in error, upon the theory that the plaintiff in error had knowledge of and acquiesced in the

use by the public of the vestibule openings between the coaches of the train commonly known as the Texarkana train in passing from the south side of track to the north side thereof and in passing from the south side to the New Orleans train and returning from the said train, and from the north side of the said track to the south side thereof, at the time of the injury. That it thereby became the duty of the plaintiff in error to exercise ordinary care in starting or moving the Texarkana train, to give warning of its intention to move the same by sounding the proper signal therefor so as to avoid injury to persons who might be passing between the said coaches through the said vestibule openings.

The plaintiff in error briefed the case in the United States Circuit Court of Appeals upon the theory that the rights of the defendant in error and the liability of the plaintiff in error were dependent upon the law applicable to the rights and liability in cases of injury to a person who has boarded a train for the purpose of speeding a friend, or meeting a guest. As I see it, the case does not come within that class of cases, but rather within the class of authorities that announce the rights of the public and licensee and travelers and the liability of railway companies, where injury is received by a person crossing the tracks of the railroad at a public crossing, where the rear end of the train is standing within a short distance of such crossing. Under the circumstances of this case, Miss Marcus, like a person using such public crossing, had the right

to assume that the train would not be moved without proper warning or signal thereof being given by the persons in charge of the movement or the operation of the same.

The plaintiff in error presented in the United States Circuit Court of Appeals, the following propositions for reviewing the judgment of the Trial Court:

> First: "Under the circumstances of the case it cannot be considered an act of negligence for the railway company to have left the vestibule open on the Texarkana train."
>
> Second: "Under the circumstances of this case, the trainmen were under no obligation to use care to see whether persons who had gone to the Shreveport train, were crossing over the Texarkana train when it was started in backward motion."
>
> Third: "The defendant railway company would not be liable for the injury caused by a jerk or jar of the train, but the jerk must have been an unusual one resulting from negligence to make the defendant liable."

The defendant in error answered those propositions in the United States Circuit Court of Appeals, and will here answer the same, in the order presented:

FIRST.

There is no merit in the contention that the charge of the Trial Court, or the refusal of charges requested with reference to the vestibule opening, constitutes error.

It was contended by some of the witnesses for the plaintiff in error that the vestibule openings on the north side of the Texarkana train, were for the purpose of permitting the passengers on the Texarkana train who wished to board the New Orleans train, to alight on that side of the track, and not for the purpose of permitting persons to cross the train from one side to the other. All of the testimony of the defendant in error, and practically all of the testimony of the plaintiff in error, was to the effect that the public used the said vestibule opening as a passage way from the south side of Marshall and the New Orleans train, while the Texarkana train was standing at the station.

The charge of the Trial Court, which must be considered as a whole, limited the defendant in error's right to recover to the railway company being guilty of negligence in failing to give signal that the train was about to be moved, and in starting the train under such circumstances as that the persons in charge of the train should have known that the defendant in error, or some other person, was using the vestibule opening for the purpose of passing from one side of the train to the other.

The Court instructed the jury, transcript page 102:

> "And if you further find from a preponderance of the evidence that the operatives in charge of the Texarkana train either knew that Miss Marcus was about to board the train for the purpose of crossing it, or, if under all the circumstances before you, you believe that by the

exercise of ordinary care they could have discovered that she or some one else might be reasonably expected to attempt to cross the Texarkana train at the time and place, and if you further find from a preponderance of the evidence before you that the operatives in charge of the Texarkana train failed to close the vestibule doors and started the train without giving any signal or warning that they expected to put it in motion, and if you further find from a preponderance of the evidence that the train started, Miss Marcus being on the train under those circumstances, by a sudden jerk or jar and she was thrown to the ground and injured, and if you should further find from all of the evidence before you that the acts of failing to close the vestibule door and failing to give proper signals that the train was about to be set in motion and starting the same with a sudden jerk or jar, taken individually or collectively, amounted upon the part of the operatives in charge of the Texarkana train to a failure to exercise ordinary care, that is such care as a person or ordinary prudence would have exercised under similar circumstances, and that this failure was the direct and proximate cause of her being thrown to the ground and injured, then the plaintiff would be entitled to recover."

It will be observed that this charge required the jury to find, first, that the train was started without a signal of its intention to start being given, and that if the jury should fail to find that it was started without a signal of its intention to start being given, that under no circumstances would the defendant in error be permitted to recover. Also, that if the jury should find that the train

was started without a signal being given, before finding for the defendant in error it was necessary for the jury to further find that the railway company was guilty of some act of negligence, either in failing to close the vestibule doors on the north side, or in discovering the condition and position of the defendant in error and in failing to give proper signals that the train was about to be set in motion, or starting the train with a sudden jerk, that it was the duty of the jury to return a verdict in favor of the plaintiff in error.

On page 82 transcript, the conductor of the train testifies:

> "I could not answer why the vestibule door on the north side of the train was not closed as soon as the pasengers left No. 2 for the Shreveport train."

There was certainly no reason why these doors should not have been closed before the train was started in motion, and certainly the plaintiff in error was not injured by the charge given especially when considered in connection with the further portion of the main charge, as shown on page 104 transcript, where the court says:

> "I further charge you that if before the plaintiff went upon the Texarkana train, the engine bell was rung and the conductor of the train announced "All aboard," in the usual and customary way, then the plaintiff cannot recover in this case, even though you find from the testimony that from inadvertence, or inattention, she

failed to hear the ringing of the bell, or failed to hear the announcement of the conductor that the train was about to be set in motion."

Thus it was emphasized by the Trial Court that the defendant in error could not recover unless the train was started without any signal of intention to start the same being given.

The charge is not subject to the criticism that it applied to the south side of the train known as the Texarkana train, for it clearly referred to the vestibule on the north side of the train, where one of the witnesses of the plaintiff in error had contended that the vestibule was only left open for the purpose of permitting the passengers on train No. 2, or the Texarkana train, to leave that train and go to the New Orleans train, and that when the passengers from the Texarkana train had left the train to go to the New Orleans train, that it was necessary for the vestibule on that side of the train to be left open longer.

The contention made by the plaintiff in error, under its first proposition, is unusually technical, for the case was submitted to the jury on the theory that if the railway company had, for a long time, invited the public to use these vestibule openings as a passage way between the New Orleans train and the station, and the south side of the railroad track at that place, and was chargeable with knowledge that people were liable to be crossing the said vestibule openings at the time the train was started, that it then became the duty of the railway company to give

proper notice, or signal, of the intention to move the train before starting the same, and that a failure to give such notice rendered the railway company liable for the injuries received by persons being thrown from the train; and that in the particular case the defendant in error was using the vestibule openings for the purpose of passing from the New Orleans train to the south side of the Texarkana train, and that no signal of an intention to move the Texarkana train was given, and that just as the defendant in error was stepping from the train that the train was suddenly started without notice or warning whatever. The case, by the charge as a whole, clearly presents the proposition that if the defendant in error was injured by reason of the Texarkana train being moved without warning, and if the railway company had long acquiesced in the public use of the vestibule openings as a passage way, and if the plaintiff was jerked from the train by it being started, and that the conduct of the railway company in failing to appreciate the situation of the plaintiff and protect her from injury, amounted to a failure to exercise ordinary care upon its part, under the exigencies of the situation, that then the railway company was liable to the defendant in error for the damages that she sustained thereby.

Under the facts in this case, and under the charge of the Court, which authorized a recovery on behalf of the defendant in error, only in the event that the railway company was negligent in the respect referred to, a verdict

having been rendered in favor of the defendant in error for an amount not in excess of the damages sustained by her, there is no reason for interfering with the verdict of the jury, and the case should be affirmed.

SECOND.

The second proposition relied upon by the plaintiff in error in the United States Circuit Court of Appeals:

> "Under the circumstances of this case the trainmen were under no obligation to use care to see whether persons who had gone to the Shreveport train were crossing over the Texarkana train when it was started in backward motion."

Under this proposition the plaintiff in error, in the United States Circuit Court of Appeals, contended that it owed no duty to the defendant in error, unless its employees knew of her perilous situation or knew that she was on board the train when it was started. That it had the right to start the train without giving a signal, or without exercising any precaution whatever to prevent injury to persons who might be passing across that train, to or from the New Orleans train (or Shreveport train).

Plaintiff in error cited authorities and relied upon them, which define the rights of persons speeding parting guests or meeting friends, boarding the train to assist in getting upon or off the train, whereas the rights of the defendant in error and the liability of the plaintiff in error in this case, depend upon the duty owing by a railway

company in starting or propelling its train across a highway or public path where persons should be expected to be crossing or using said path or highway.

A great number of witnesses testified that during a number of years that the railway company had acquiesced in and permitted persons to use the vestibule openings of the Texarkana train in passing from one side of the train to the other while the train was standing at the station in Marshall, and especially in passing from the south side of the track to the Shreveport or New Orleans train on the north side, and in passing from the Shreveport or New Orleans train, across the Texarkana train to the south side of the track. In fact, the testimony upon this phase of the case is so strong that it occurs to me that it should be treated as a proven fact in the case that the railway company had permitted and acquiesced in this use of the vestibule openings between the coaches of the said Texarkana train, for a great number of years.

R. K. Turner, a witness for the defendant in error, who had lived in Marshall all of his life and was an officer, testified, transcript page 60:

> "When No. 2 (Texarkana train) would come into the station at Marshall, there was a habit and custom of people passing across to the Shreveport train (meaning New Orleans train), and back from the Shreveport train to the depot or hotels. They would pass between the cars and over the platform of No. 2, or they might go down two or three hundred feet opposite the Elgin

Hotel and pass around the train, or go around the west end of the train down near the Ginocchio Hotel about two hundred feet. I judge the way they would go would depend on the length of the train, whether a long or a short train. No. 2 had what is known as vestibule coaches and they could be entirely closed so there would be no place open between the coaches. Generally the vestibules between the coaches and chair cars were open while No. 2 was standing there; that is, between the two day coaches. I would see a good many cross from one side of No. 2 to the other over the platform. That condition had existed as far back as I can remember, a good long time."

Early Aiken, a witness for the defendant in error, and an officer in Marshall, testified, transcript page 62:

"I have seen people going to the Shreveport train cross through the vestibule openings from the south to the north side of No. 2, and I have seen persons who had accompanied passengers to the Shreveport train come back through there. I have seen a good many do that. That condition existed prior to the injury to plaintiff every since I have been on the force, and I have been working around there eight or ten years. The vestibule doors can be closed or opened, and when they are closed there is no space left between the cars through which one could pass."

B. A. Cargill, who has held an official position in Marshall, testified, transcript page 63:

"There was a train left Marshall late in the evening for Shreveport, known as No. 52. There was a train that came into Marshall from the

West going to Texarkana, known as No. 2. The station was on the south track. People on the depot side of the track, in going across to Shreveport train when No. 2 was standing at the depot, would have to cross No. 2 over the platform, and this would be likewise true when they were returning from the Shreveport train to the depot or the hotels, or when they were returning to town after seeing friends off on the Shreveport train. If they wanted to get back on the south side before No. 2 left they would cross over No. 2. The vestibules were left open while No. 2 was standing there. That condition existed as long as the old depot was there during the time I was an officer. A good many people would cross over No. 2 while it was standing there. Marshall is a town of about thirteen thousand people and there was a good deal of travel on both of those trains."

The witnesses, Ray Clark, W. H. Whitsett, N. A. Green, R. A. Burnett, Jesse James, all testified to the same facts. It is significant that no evidence was offered by the railway company that contradicted this testimony, showing long continued usage and custom, except the bare statement of the conductor, Fowler, who said that he did not understand that the vestibule door on the north side of the Texarkana train was left open for the purpose of permitting people to cross back and forth, but who admitted, on cross examination, that the people did use the

vestibule opening between the coaches for the purposes of passing to and from the north side of the Texarkana train, thus showing knowledge and acquiescense in such use.

The testimony was conflicting as to whether any signal was given of an intention to start the train. Thus, A. Marcus, testified for the defendant in error, transcript page 39:

> "We had no notice that the train was about to start. No signals of any kind had been given. I did not hear any."

Also,

> "I did not hear anyone say anything about the train going to start. I did not hear a word of that kind. I heard neither whistle nor bell sound. Nothing at all."

Also, "the train was started with a sudden jerk."

The witness, Miss Adrienne Marcus, testified, transcript page 44:

> "I never heard or saw any notice that the train was about to move. I never heard anything and I have pretty good ears too. The bell absolutely was not rung. I did not hear it. The whistle was not sounded."

Mrs. Sam Wolff, testified, transcript, page 50:

> "Before we stepped on the coach to go over I did not see anything to indicate that the train was about to start. The moving of the train was the first notice I had of an intention to move.

The train made a sudden jerk, or start, I was back of Miss May at the time the train gave the jerk and she was on her way down the steps of the coach. The sudden moving of the train threw Miss May Marcus to the ground from the steps of the coach. I got off of the train after Miss May fell. I think my father and Louis Kariel were behind me. That is my recollection. Before the train started with a jerk, no bell was sounded or whistle blown and no outcry or signal was given of an intention to start the train."

On cross examination the same witness testified, transcript page 51:

"I said no bell was sounded or whistle blown. I was listening for the bell or whistle because we would not have attempted to have crossed the train if a signal had been given. I listened for the bell before going on the train and after I started on. The whistle was not blown or bell rung, for there were seven in the party, and some of us would have heard it."

M. L. Weisman testified, transcript, page 55:

"I did not hear the bell or whistle sounded just before the train started and there was no cry of "all aboard" or anything to indicate that the train was about to move."

Louis Kariel testified, transcript page 74:

"It started with a violent jerk and kept on moving down the track. Miss May was preparing to get off and alight from the car. She fell or was jerked to the ground. There were no signals given on the north side of No. 2, neither was there any bells, or whistles, blown to indicate that the train was about to be moved. There

were no signals given on either side of the train and I heard nothing said by any person on either side of the train to indicate that the train was to be moved."

Conductor Fowler testified, transcript page 82:

"The porter was supposed to be there to ascertain if everything was all right. I could not answer why the vestibule door on the north side of the train was not closed as soon as the passengers left No. 2 for the Shreveport train."

Again on the same page:

"We leave the doors open so people can pass to and from the Shreveport train over the steps of No. 2, and the equipment is arranged that way. That same condition has existed as long as we have had vestibules."

Again on page 83:

"We hate very badly to have the doors on the north side closed and some one want to run across the train. He would claim that we had the vestibule doors closed and he got left. We leave it open so they can cross when they want to for convenience both ways."

The Court instructed the jury that the defendant in error could only recover in the event that the jury should find that the railway company started the train without giving any signal or notice of its intention to do so while Miss Marcus was in the act of stepping from the steps thereof, and that she was jerked from the train and in-

jured, if the jury should find that the railway company was negligent in the respect referred to.

The Court instructed the jury that the custom of people pasing through the vestibule openings could be considered by the jury for the purpose of determining whether the railway company was guilty of negligence in the manner referred to, and whether the defendant in error was guilty of contributory negligence.

Under the evidence in this case, showing a long acquiencense in the custom of persons using the vestibule openings between the coaches of the Texarkana train for the purpose of passing from one side of the track to the other, the duties and responsibility of the railway company were governed by that line of authorities defining the rights and duties and obligations of persons and the railroad where a crossing is being used as a public crossing, or as one used under a license.

The following authorities hold the railway company liable for injuries at crossings where the train was started without warning and injured a person rightfully crossing the track, all of which are applicable to this case: viz:

Thompson on Negligence, Vol. 2, Sections 1472, 1552, 1562, 1568, 1569, 1571, 1592, 1574, 1594, 1678, 1692, 1693, 1718, 1723, 1724, 1725, 1726.

Where, under the circumstances of the particular situation, the railway company should expect persons to be present or using its facilities it must give proper

warning of its intention to move its train. Thus it is said in Second Thompson on Negligence, Section 1726:

> "It is a sound and wholesome rule of law, humane and conservative of human life, that, without regard to the question whether the person killed or injured in the particular case was or was not a trespasser or a bare licensee upon the track of the railway company, the company is bound to exercise special care and watchfulness at any point upon its track, where people may be expected upon the track in considerable numbers, as, for example, in a city where the population is dense; even between streets where the track has been extensively used for a long time by pedestrians; or, where the roadbed is constantly used by pedestrians; or, at a bridge in a thickly settled community which the public, in considerable numbers, have used for many years. At such places the railway company is bound to anticipate the presence of persons on the track, to keep a reasonable lookout for them, to give warning signals, such as will apprise them of the danger of an approaching train, to moderate the speed of its train, so as to enable them to escape injury; and a failure of duty in this respect will make the railway company liable to any person thereby injured, subject, of course, to the qualification that his contributory negligence may bar a recovery."

The rule with reference to signals at any point where the railway company should expect persons to be crossing is laid down in Second Thompson on Negligence, Section 1571, as follows:

> "The danger to the public at crossings or other places where the public have a right to be

in common with the railway company, of backing its cars without having a man standing on the foremost car to look out, to give warning to the engineer and the endangered traveler, and to apply the brake, is so obvious as not to require discusion. A railway company, backing a train across a public street or highway in the dark, is bound to give warning of its approach."
Also same section:

"Where the public are in the habit of going around trains, at or near highway crossings, and those in the mangement of a train know that such is the practice, they are bound to move the train with reference to it, and to give proper signals when starting, and to have some one at the end of the train to guard against accident."

With reference to starting trains at or near crossings, Second Thompson on Negligence, Section 1568, says:

"It is a sound conclusion that it is the duty of the engineer in charge of a train standing still, before starting his engine across a street, not only to give timely warning of his intention, but also to see whether his train will not be likely to strike a traveler or frighten his horses. It is also a just conclusion that where a railway company stops a train upon a public crossing, leaving an opening sufficiently wide for travelers to pass through, it is bound, before moving the cars so as to close the opening, to ring the bell or sound the whistle, although it is under no statutory duty to do so; and that at least its failure so to do is evidence of negligence to be considered by the jury. And the same rule has been applied where a train has been stopped across a public street for

a greater length of time than permitted by a city ordinance without being uncoupled, and a boy, following the example of others, attempts to pass through it, when the train starts without warning and injures him."

Also Section 1569, it is said:

> "Where a railway train has stopped upon or near a public highway crossing, the duty of giving warning before starting is obvious."

Also see case of Chicago & Ohio Railway Company vs. Steele, 29 U. S. C. A. 81, and authorities there collated, which sustain this proposition.

This case is also analagous to the authorities holding the railway company liable for failure to have lights or other warning signals on cars that are approaching crossings. That is to say, that the licensee or person who is rightfully using a crossing or passing through an open vestibule that has long been used in the same manner, is entitled to such notice and signals as will apprise a reasonably prudent person of the approach or movement of cars that may injure him.

Baltimore & Potomac Ry. vs. Cumberland, 176, U. S. 232.

Grand Truck Ry. vs. Ives, 144, U. S. 408.

Delaware & Continental Improvement Co. vs. Steed, 75, U. S. 161.

T. & P. Ry. vs. Cody, 166, U. S. 606.

Ellsworth vs. Metheny, 44, C. C. A. 484.

Adams vs. Southern Railway, 28 C. C. A. 495, 84 Fed. 596.

From the authorities referred to it will be seen that the railway company clearly owed to the defendant in error the duty of exercising ordinary care to avoid injury to persons who might be expected to be crossing the train at the time.

Where a person enters upon the cars or premises of a railway company under circumstances not connected with business of the railway company and that do not raise an inference that the employes of the railway company should apprehend the presence of such person, or of some person, it is quite clear that the railway company is not liable for injuries inflicted upon such person in the ordinary operation of it road, but on the other hand, where the railway company has acquiesced in the use by the public or by its patrons of its tracks and instrumentalities to that extent that such use has become habitual, and the presence of such persons or some of them may be expected, it then becomes the duty of the railway company to exercise ordinary care to avoid injury to such persons, and it is required in the exercise of that care to anticipate the probability of persons being in a situation to be injured by its failure to do so. It is but stating a simple proposition in a different way, that where the railway company has no right to expect its patrons or the traveling public to be in a situation to be injured by the movement of its trains, that it owes no duty to give warning of its intention to move them, but where the situation is such that it is charged with the duty of anticipating or expect-

ing the presence of its patrons or the public, and of some of them being injured by such movement of its machinery and trains without giving warning, it becomes its duty to give warning. Where no duty exists and it knows of the peril of a person using its property, it must give warning; where the duty exists and it ought to anticipate the presence of a person who may be injured by its failure to give warning, it follows as an axiomatic proposition that the warning must be given regardless of whether it has actual knowledge of the presence of the person that is in a situation to be injured, because the duty cannot be discharged without giving warning to those persons who may be injured by reason of a failure to give same. Therefore under the facts of this case we are driven to the inevitable conclusion that it is clearly a question of fact to be determined by the jury as to whether the railway company was guilty of negligence under the circumstances of this particular case in failing to give any signals of an intention to cause the Texarkana train to be moved from the station.

This phase of the case was submitted to the jury and the jury has returned a verdict finding that the railway company was guilty of negligence in failing to give the warning, and that the injuries of the defendant in error were inflicted by reason of such failure, and therefore it follows that the verdict is sustained by the testimony in the case and that it should not be disturbed.

THIRD.

Plaintiff in error contends that the railway company would not be liable for the injury caused by a jerk or jar

of the train, but the jerk must have been an unusual one —one resulting from negligence, to make it liable.

The only exception reserved by the plaintiff in error to the court's charge with reference to the sudden jerk or movement of the train, is as follows:

> "We except to the charge as to the sudden jerk of the train because the undisputed evidence shows that the engineer did not know anything about the people being back there." Transcript page 107.

In the trial of this case it was recognized by the plaintiff in error that there was abundant testimony to raise the issue of the company having negligently given the train a sudden or unusual jerk or movement in starting it, but as indicated in the exception to the charge of the court on this point, the plaintiff in error contended that the defendant in error could not complain of such sudden jerk or movement of the train for the reason that plaintiff in error owed her no duty whatever, inasmuch as the engineer did not know anything about her being on the car or being in the act of alighting therefrom. The issue as to whether the train was suddenly jerked or suddenly moved, such as to constitute negligence on the part of the persons handling the train as to persons who were rightfully upon the train, or to whom it owed a duty of exercising ordinary care, was fully raised by the evidence of the defendant in error, which showed that the plaintiff in error did cause the train to be given such violent, sud-

den jerk and movement; and by the evidence offered by the plaintiff in error to the effect that no sudden jerk or movement was given in starting the train. The witnesses of the defendant in error testified upon this point substantially as follows:

The witness, A. Marcus, testified, transcript 39:

"Miss May Marcus was on the steps of the coach just about to alight when the train gave a jerk and she fell. She was about ready to step off. The train started to back very suddenly."

Miss Adrienne Marcus, testified, transcript 43:

"The train started with a jerk just as quick as it could and that threw my sister off on the ground."

Mrs. Sam Wolff testified, transcript 50:

"Before we stepped on the coach to go over I did not see anything to indicate that the train was about to start. The moving of the train was the first notice that I had of an intention to move. The train made a sudden jerk or start. I was back of Miss May at the time the train gave the jerk and she was on her way down the steps of the coach. The sudden movement of the train threw Miss May Marcus to the ground from the steps of the coach."

Louis Kariel testified, transcript 74:

"It started with a violent jerk and kept on moving down the track. Miss May was preparing to get off and alight from the car. She fell or was jerked to the ground."

The plaintiff in error, not making any point that the evidence was insufficient to show that the movement of the train described by the witnesses of the defendant in error constituted negligence, endeavored to meet this issue by the evidence of the witness R. H. Bortle, who testified for plaintiff in error, transcript 78, to facts tending to show that no sudden jerk or movement was given the train when starting out of the station at Marshall, where he says:

> "The track at Marshall is upgrade going west from the station at Marshall, and hard to give the train a jerk while backing out, and Mr. Wilder was always careful about jerking the train."

If the doctrine announced by the First Circuit in the case of Boston Elevated Railway Company vs. Smith, 168 Fed. Rep. 629, which is quoted by the appellant, and relied upon in its brief in the United States Circuit Court of Appeals in this case, shall be accepted as the law applicable to the movement of trains or steam railroads as well as upon street railways, then the measure of proof in the case we are now considering was sufficient to meet the criticism urged by the judge who wrote the opinion in that case, in that the testimony of quite a number of witnesses who testified in behalf of the defendant in error in this case clearly shows that the movement of the train

was unusual, not ordinary, in that the testimony of these witnesses show that the train was started with a violent jerk or movement.

The judge in the Smith case says that the injured party should have shown in that case that the start of the car was unusually sudden, or violent.

The witness, Louis Kariel, testified in the case we are now considering: "It started with a violent jerk." It occurs to me that the opinion in the Smith case begs the question, for in the ordinary affairs of life we know that when a person is testifying to the movement of a train, and describes the movement as sudden, or with a jerk, we realize that this testimony is given and to be considered in a comparative sense. That is to say, the movement referred to was different to what might have been expected under the circumstances. Different to that usually occurring in the movement of the train under the same circumstances. But if it shall be contended that the measure laid down in the Smith case must be fulfilled, then the evidence in this case that the train was started with a violent jerk meets the requirement of the Smith case, which says that the start must have been unusual, sudden or violent. In addition to this I again direct attention to the fact that both parties tried the case upon the theory, and it was submitted by the Trial Judge upon the theory, without protest or objection, that the evidence was abundantant to raise the issue of negligence upon this point, and

the plaintiff in error only contended that the plaintiff in error was not required to use such care under the circumstances of the particular situation. In other words, that it would only be required to use any care for the protection of the plaintiff when its agents, servants and employees had actual knowledge of her presence and danger.

In passing upon the sufficiency or insufficiency of the Court's charge in this case upon this phase of the case, and in determining whether the exceptions reserved to the charge at the time were sufficient, it is necessary that the charge of the Court shall be considered as a whole. The charge of the Court, taken as a whole, required the jury to find as indispensable elements authorizing a recovery, the following distinct facts:

First: That the train was started without any signal whatever having been given;

Second: That the train was started with a sudden jerk which threw the defendant in error from the train;

Third: That a person of ordinary care and prudence in charge of the train at the time under the exigencies of the particular situation would have anticipated that the defendant in error, or some other person, would probably be injured by the train being started in the manner and under the circumstances under which this train was started, without giving notice or warning of its intention to move.

Stated in a different way it means, that if the train was started with a sudden jerk or movement, without any signals of an intention to start having been given, and if the railway company had long acquiesced in the use of the vestibule openings in this train as a passage way for persons going to and returning from the Shreveport and New Orleans train to such an extent as that it would, in the exercise of ordinary care, have anticipated the presence of some persons upon the said train at the time it started, who would be leaving the same, that then the jury might consider all of these questions, together with the fact that the vestibule on the north side was left open at the time the train was started, in determining whether the railway company had been guilty of negligence in starting the train with a sudden jerk, such as to throw the defendant in error therefrom and without giving any signal of an intention to start the same.

Viewed from that standpoint and in that light (and it seems to me that it is impossible to give the charge any other interpretation or construction) it clearly appears that the Court committed no error in submitting the question of sudden jerk or movement of the train to the jury in the manner in which it was submitted. If there was error in this respect, in my opinion it was clearly in favor of the plaintiff in error, for if the train was started with a careful movement but without giving a signal that the same was about to start, the defendant in error would be entitled to recover if the use of the vestibule openings as

a passage way had been such as to place upon the railway company the burden of anticipating the probability of some one being in the act of crossing the train and being injured by the movement of the train without a signal being given.

It seems to me that the rule of law is clear that if the railway company had long acquiesced in the use of the openings between the cars of the Texarkana train by the public in passing to and from the Shreveport, or New Orleans train, and in moving from one side of the track at the station to the other side thereof, that the movement of the Texarkana train, without giving a signal of an intention to move the same, would clearly raise the issue of the plaintiff in error being guilty of negligence therein, and would authorize a recovery by a person injured in so using the said opening or passage way, if the jury should find that such conduct upon the part of the railway company constituted negligence under the circumstances and should find that the injured person was free from contributory negligence.

The Trial Court presented this phase of the case to the jury in a charge that was more favorable to the railway company than it had the right to expect. The only theory upon which the defendant in error was permitted to recover was that the train was started without a signal having been given, and that there must have been such acquiescense in the use of this opening as to charge the

railway company with the duty of anticipating that some person would be using the same when the train was started, and in addition thereto that the train must have been started with a sudden jerk or movement; and further, that from all of these the jury must find that the railway company was guilty of negligence, which caused the injury to the defendant in error.

I submit that the judgment in this case should be, in all things affirmed.

S. P. JONES,

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